MISSISSIPPI LAW JOURNAL

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MISSISSIPPI ISSUE

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IN MEMORIAM

WILLIAM P. MURPHY

Photo courtesy of Law Center Archive

SEPTEMBER 13, 1919 – SEPTEMBER 27, 2007

Professor, University of Mississippi School of Law, 1953-1962

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Between 1954 and 1962, the *Mississippi Law Journal* had the pleasure of publishing the following articles and book reviews by Professor Murphy.

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WILLIAM P. MURPHY: TRIBUTE TO A HERO

*Samuel Marion Davis**

I first met Bill Murphy at a class reunion dinner for the University of Mississippi Law School class of 1955 in Jackson, Mississippi, in June 2001. That was not the first occasion on which I had heard his name, however. When I was on the faculty at the University of Georgia Law School many years before, one of my colleagues, Mack Player, knowing of my Mississippi roots, asked me if I knew or had heard of Bill Murphy. I had not. Mack told me that he had Professor Murphy during his law school days at the University of Missouri, and that Bill was known (with great fondness) as the "Kingsfield" of the Missouri law faculty.

When I became dean of the University of Mississippi Law School in 1997, I heard a great deal about Bill Murphy, his courage and his values. I looked forward to the reunion dinner with great anticipation because at last I would have the chance to meet Professor Bill Murphy. That dinner was a memorable occasion for me, marked by an opportunity not only to meet Bill but to visit with his wife and him at great length. He had been invited to the dinner by the members of the Class of 1955 because he was one of their heroes, and they held him in great esteem. He was the only one of their former professors in attendance. I was honored to be invited.

The class of 1955 included a Mississippi Supreme Court

* Dean, Professor of Law and Holder of the Jamie L. Whitten Chair of Law and Government at the University of Mississippi School of Law.

Chief Justice, Lenore (Loving) Prather; a Mississippi Court of Appeals judge (and former dean of the Mississippi College Law School), Mary Libby (Bickerstaff) Payne; and one member, Agustin Mangual, who had traveled all the way from Puerto Rico just to attend the dinner, to visit with old friends and to honor Professor Murphy. The class also included Hunter Gholson, now a distinguished attorney in Columbus, Mississippi. More will be said about him later. Many other distinguished practitioners and others were in attendance, all of them obviously there to recognize and to visit with their beloved professor, Bill Murphy.

Bill Murphy is remembered at the University of Mississippi, and especially at the law school, as a hero of the 1960s. He stood tall for civil rights at a time when not many were standing by his side, particularly those who were in positions of power and influence in the state at the time, a time when racial segregation was the order of the day. The 1960s were turbulent years all around the country, but especially in Mississippi and the Deep South. Many will recall the violent eruption on the Ole Miss campus when James Meredith enrolled in the fall of 1962. Those terrible days were marked by violence, the deaths of two people, and the occupation by federal troops in the weeks and months to follow.

Few people were heard to speak out in opposition to the prevailing political and social culture of the day, which included a virulent brand of anti-federalism often centered around racial segregation, particularly in the public schools. One of those was Bill Murphy, who began to voice his concerns not in the 1960s but in the mid-1950s. Bill had the temerity to suggest simply that *Brown v. Board of Education*[1] represented the law of the land, and, therefore, integration of the schools in Mississippi and the rest of the South was not only the right and appropriate thing to do but was also compelled under the law.

The story of what he did has been chronicled elsewhere.[2]

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[1] 347 U.S. 483 (1954).

[2] Charles W. Eagles, *"Thought Control" in Mississippi: The Case of Professor William P. Murphy*, 66 J. MISS. HIST. 151 (2004) (hereinafter Eagles); MICHAEL DE L. LANDON, THE UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW: A SESQUICENTENNIAL

Professor Murphy began his teaching career at the University of Mississippi in fall 1953, after foregoing admission to Yale's LL.M. program that was to have commenced that same fall. Former Dean Robert J. Farley had persuaded Murphy to start teaching that fall instead, postponing until the next year his LL.M. studies at Yale. In May 1954, at the end of his first year of teaching, the Supreme Court rendered its historic unanimous decision in *Brown v. Board of Education*. Murphy, a Southerner by birth, had been reared in an environment in which he had readily accepted racial segregation. His service in the Labor Department in Washington, D.C., and in Nashville, Tennessee, prior to launching his career in teaching, proved to be an eye-opening experience. For the first time he saw blacks and whites together in a social setting and saw racially mixed couples interacting socially. He began a thoughtful reflection on the relationship between the races and on racial prejudice and injustice.[3]

When the Court announced its decision in the *Brown* case, Bill Murphy spent the summer of 1954, prior to leaving for Yale, thinking about the appropriate response to the *Brown* decision. Unlike the more typical response of many Southerners and Mississippians, one of hostility and defiance, Murphy's response was thoughtful, measured and rational. He set forth his views in a letter to the Jackson *Clarion-Ledger* published June 30, 1954, urging that the Supreme Court's decision in *Brown* should be accepted and followed. He further observed that integration of the schools was inevitable, discussed the manifold problems posed to the South by the Court's decision, and offered some solutions to those challenges. His letter was met with scathing criticism around the state, at least as evidenced by editorial responses by conservative newspaper editors and by letters to the editor critical of his positions. One urged that Murphy as well as his boss, Dean Robert J. Farley, be "summarily fired" from the University.[4]

HISTORY 92-97 (2006) [hereinafter LANDON].

[3] Eagles, *supra* note 2, at 153-55.

[4] *Id.* at 155-61; LANDON, *supra* note 2, at 93-94. The quote is from an editorial by Mary Cain in the *Summit Sun* of July 15, 1954, discussed in Eagles, *supra* note 2, at

Professor Murphy did not respond to the editorial calling for his summary dismissal, written by Mary Cain, editor of the Summit *Sun* in Summit, Mississippi, and titled "Something Rotten at Ole Miss."[5] The gist of that editorial, as well as other criticisms of Professor Murphy and Dean Farley, was that any view perceived as expressing support for and approval of the Court's decision in *Brown* obviously must be a view in opposition to segregation in the public schools, and more broadly to total separation of the races. As such, his view represented a direct threat to the Southern way of life and a march down the path leading to tyranny by the judiciary and by the government itself.

To their credit, two law students replied to the editorial, one of them Ralph White of Oakland, Mississippi, and the other Hunter Gholson of Columbus, Mississippi. Gholson characterized the editorial as an "inflamed reaction of suicidal opposition to anything condoning the existence of a national government" and dismissed Cain's attack on Murphy as an "unmitigated attack on a sensible and workable plan."[6] He further stated that what really bothered Cain was Murphy's refusal "to uselessly scream and shout about fighting the court."[7] White in his letter assured Cain that "there is absolutely nothing rotten in the law school at Ole Miss."[8]

Political pressure, however, continued to mount over the years against both Farley and Murphy, calling unequivocally for their ouster. A resolution enacted by the state senate in May 1960 called on the board of trustees "to forthwith terminate the contract of employment of Dr. William P. Murphy, professor of law."[9] Law students, however, objected. In that same month, 120 of 182 law students at the school signed a petition asking the state legislature "to abandon the attack now being made on

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160-61 and LANDON, *supra* note 2 at 93-94.

[5] Eagles, *supra* note 2, at 160-61 (discussing Mary Cain, Letter to the Editor, SUMMIT SUN, July 15, 1954).

[6] Eagles, *supra* note 2, at 160-61.

[7] *Id.*

[8] *Id.*

[9] LANDON, *supra* note 2, at 95-96.

the honorable William P. Murphy."[10] Pat Scanlon of Jackson, Mississippi, (now a distinguished attorney and former President of the Mississippi Bar) as the student body president, signed a resolution calling for delivery of the petition to Dean Farley.[11]

In the meantime, Professor Murphy accepted an invitation to serve as a visiting professor at the University of Kentucky College of Law for the 1960-1961 year, in an effort to bring some modicum of calm to the surging storm and to avoid being a lightning rod attracting further criticism of the University. He accepted another visiting professorship at the University of Missouri School of Law for the 1961-1962 year. During his absence, the board of trustees made it very clear that Murphy, who did not yet have tenure, was not welcome to return. A compromise was reached allowing him to teach at the University for the summer term 1962, and that fall he returned to the University of Missouri as a regular faculty member.[12] He later became a professor of law at the University of North Carolina, where he held a chair in law.

In the meantime, Dean Robert Farley on December 7, 1963, turned 65, at that time the mandatory retirement age for faculty at the University. A time-honored exception allowed a faculty member to continue in his or her position for a few years more, provided the department or school wished him or her to do so. Chancellor J.D. Williams informed Dean Farley that the board of trustees were divided on the question of whether he would need to step down at the end of the fall semester 1963 or at the end of the 1963-1964 academic year, but that a substantial majority were of the opinion that in any event he must step down at the end of the year. Farley, a member of a long-time Oxford family, a former President of the Mississippi Bar and whose father, Leonard J. Farley, also had served as dean of the Law School, resigned as dean on June 6, 1963, to accept a faculty position at the University of Florida College of Law, where he served until his retirement from teaching altogether.[13]

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[10] *Id.*

[11] *Id.*

[12] *Id.* at 96.

[13] *Id.* at 97.

Thus, two voices of reason, two of the most visible, articulate and outspoken champions of justice and the rule of law in the State of Mississippi, were silenced, crushed under an overwhelming tide of political and social pressure. Moreover, their ties to the University and to the state were severed, irrevocably, except for an occasional visit with family members still residing in the state.

Ironically, those who perhaps knew Bill Murphy best—his students—were his greatest admirers. They loved him as a teacher and held steadfast to his support of the Constitution and the principal of judicial review, the notion that decisions of the United States Supreme Court represent the law of the land and are to be obeyed. Their admiration clearly endured through the years, indeed, grew over the years as evidenced by the great fondness and respect they held for him at their class reunion dinner in Jackson.

I saw Bill once again, during Law Alumni Weekend in spring 2005. The class of 1955 was celebrating its fiftieth reunion. He was back on campus for the first time, so far as I know, since his departure in 1962. He was in high spirits and reveled in the opportunity to visit with his former students and to share stories from the classroom and from those days—some of them dark, but not those in the classroom—so long ago.

It is very easy to look back through today's lens, to the mid-1950s and the tumultuous years of the 1960s and say, "Oh, I would have done that, too, or I would have said that, too," to take for granted the things Bill Murphy did and said. But the truth is that, for his time, given the then-existing climate that prevailed in the wake of the *Brown* decision (a climate that is far different today), what Bill Murphy did and said was heroic. One can only admire him for the courage of his convictions, standing up for what was right and just and lawful. He said what he believed. He not only talked the talk, but he walked the walk.

Bill instilled in his students those values he articulated so well in his letter to the *Clarion-Ledger*. They represent a living legacy not only to him but to the concept of the rule of law. Bill would be proud. Dean Farley and he were right. And they did the right thing.

A SALUTE TO WILLIAM P. MURPHY

*John R. Bradley, Jr.**

It is ironically fitting that this journal should commemorate the career of William P. Murphy, University of Mississippi law professor from 1953-1962, who died September 29, 2007, at age 87.[1] We celebrate the high level of his distinguished professional achievements and his sterling contribution to the education of law students. At the same time, we point out the collective misfortune of the state's heaping on him unconscionably shabby treatment for doing his job. The irony is that his writings in these pages contributed to this inglorious purge from his professorship at the University of Mississippi School of Law.[2]

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[1] The detailed story of Murphy's career at the University of Mississippi School of Law is expertly told by an award-winning historian at the University of Mississippi in his seminal article: Charles W. Eagles, *"Thought Control" in Mississippi: The Case of Professor William P. Murphy*, 66 J. MISS. HIST. 151-99 (2004). This piece draws on that invaluable article and on Murphy's telling of the story: *A Fireside Chat by William P. Murphy*. William P. Murphy, Past Pres., Nat'l Acad. of Arbitrators, Speech at Annual Meeting of National Academy of Arbitrators in San Diego, Calif. (June 4, 1998) (transcript on file with *Mississippi Law Journal*) [hereinafter *Fireside Chat*].

[2] Leaves of absence for two years kept him nominally on the faculty through 1961-1962, but he did not teach classes at the school after 1960. This writer served as a staff member and then as editor-in-chief of this journal during the final two years of the publication of his work. The *Mississippi Law Journal* contains 485 pages of Murphy's writings from 1954-1962. The greatest number of pages are in his "State Sovereignty" series, articles that were the foundation of his book THE TRIUMPH OF NATIONALISM: STATE SOVEREIGNTY, THE FOUNDING FATHERS, AND THE MAKING OF THE CONSTITUTION (1967) and also of his J.S.D. dissertation at Yale Law School.

I. TAKE NO PRISONERS: ENFORCING OLD SOUTH RACE IDEAS IN MID-TWENTIETH CENTURY

Murphy was run off for expressing legally correct and mainstream, national views on constitutional law, including the legitimate power of the Supreme Court to rule on the interaction of law and race. His views challenged the rants of those political forces in the state who were determined, even a hundred years after secession and the Civil War, to fight on about race as a last gasp of The Lost Cause.[3]

This mid-twentieth century phase of their fight stemmed directly from their horror at President Truman's ending racial segregation in the military plus increasing evidence of an encroaching national idea that law should forbid that rights of citizens be demeaned because of race. One result was the 1948 Dixiecrat Party[4] which ran Governor Strom Thurmond of South Carolina for president and Governor Fielding Wright of Mississippi for vice-president, a ticket that won the vote in Alabama, Louisiana, Mississippi, and South Carolina. The mission to combat federal intrusion dramatically intensified over their devastation at the 1954 Supreme Court decision *Brown v. Board of Education.*[5] These southerners adopted as a battle tactic a formal resolve that states should nullify court rulings that ended state-mandated racial segregation in public schools. George Wallace of Alabama made hay in this field by standing in the schoolhouse door railing, "segregation today . . . segregation tomorrow . . . segregation forever."[6]

The means of advancing the racial agenda went far beyond nullification. Importantly, it urged seamless, massive resistance

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[3] Federal law soon buried the formal challenge, especially The Civil Rights Act of 1964 and the Voting Rights Act of 1965. Though difficult to believe now, hindsight makes clear that many of these people were so blinded by an unyielding, provincial stance on race that they could hide from themselves the reality that the tides of world history were about to engulf them.

[4] The States' Rights Democratic Party was popularly known as the Dixiecrat Party

[5] 347 U.S. 483 (1954).

[6] Governor George C. Wallace, 1963 Inaugural Address (Jan. 14, 1963) (transcript available at http://www.archives.state.al.us/govs_list/inauguralspeech.html).

devoid of local dissent. For many it is difficult to comprehend the hatefulness of the hostile measures resorted to by the reactionary political forces striving for what Dr. Eagles calls the effort at "thought control."[7] In truth these people swept with a broad broom of mean intimidation, targeting anyone who broke ranks, partly as a warning to others not to express any views at odds with the party line. They first drew a bead on Murphy when he suggested in 1954 that a higher value be placed on public education and obedience to law than on strict racial segregation.

II. MURPHY'S SIN

The right of a state to nullify an unwanted federal government position stood as a core tenet of those who led the secession of eleven southern states in the 1860s into the Confederate States of America. Then slavery was the issue. Now, these very same legal-political arguments were espoused by those who sought to cling to a way of life that once again had little regard for the legal rights of African-Americans, this in the face of growing federal civil rights law. But Bill Murphy taught in his classes and wrote in these and other pages that the contrary rulings from the Supreme Court of the United States were the law of the land and nullification was not an available option.

Murphy himself was a son of the South, having lived and been educated there, and never openly challenged the society's racial segregation that he had always known. So how did Murphy become a person so hated and feared by this group? In his study and teaching constitutional law, race was a burning topic at the time. He staunchly advocated adherence to law and was the farthest thing from a rabble-rouser. His teaching and writing advocated neither racial segregation nor integration.[8]

Near the end of his first year in law teaching, the Supreme

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[7] The extensive literature on this phenomenon is cited by Eagles, *supra* note 1, and includes, most notably, JAMES W. SILVER, MISSISSIPPI: THE CLOSED SOCIETY (1964).

[8] I feel certain he was among those many southerners whose moral compass told them that racial segregation should and would end. He also knew the cultural change would not come easily.

Court's 1954 decision in *Brown v. Board of Education* caused outrage among those holding political power in the South. After careful study both before and after the decision and after consultation with law school Dean Robert J. Farley, Murphy's 1954 letter in the Jackson *Clarion-Ledger* (1) said emphatically the Supreme Court's rulings were the law of the land and states could not choose to disobey them; (2) stressed that a state's closing its public education system would be a catastrophe; and (3) proposed a congressional enactment that the states and their courts should be responsible for implementing the Court's ruling against state-mandated segregation. His plan would accomplish this by statutorily removing the matter from the jurisdiction of the federal courts.[9]

At this point, Murphy was targeted as a traitor on race by William J. Simmons, future Mississippi ramrod of the Citizens' Council, a politically influential group dubbed the "uptown Klan" by Hodding Carter, editor of the Greenville *Delta Democrat Times*.[10] The attacks got vicious when his 1958 book review in the *Mississippi Law Journal* laid waste to a 1957 book espousing the primacy of states' rights.[11]

III. MURPHY STOOD ON PRINCIPLE

During his nine-year career as a member of the University of Mississippi law faculty, Bill Murphy's students saw him as an intellectually energetic teacher of genuine professionalism in the grasp of the subject matter and in the ability to draw students into an engaging study of it. His daily work in the classroom set the bar of accomplishment at a high level, demonstrating to would-be lawyers what true competence looked like. In

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[9] The letter was also sent to seventeen senators from southern states. The episode is described in detail in Eagles, *supra*, at pp. 155-62. He later doubted the wisdom of the idea, seeing it was unrealistic to assume the good faith needed for the states and their courts to resolve the quest equitably. *Fireside Chat*, *supra* note 1, at 8.

[10] *See e.g.,* Robert A. Holmes, *White Citizens Council*, 33 PHYLON 91, 91 (1972) (reviewing NEIL R. MCMILLAN, THE CITIZENS COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION 1954-1964 (1971)).

[11] William P. Murphy, *The Sovereign States By James Jackson Kilpatrick*, 29 MISS. L.J. 110 (1957) (book review).

addition, his personal style made him eminently approachable and likeable. His writing on timely issues showed students other facets of his professional competence, dedication, and energy, and they gave learning opportunities for students, both for their substance and as examples of high quality professional work of a knowledgeable, analytical, and thoughtful scholar.

Little wonder then that law students felt the ground shaking upon learning of the prospect of his being fired at the behest of influential political forces, people accustomed to using economic and political muscle to bully, threaten, and retaliate. Murphy had dared challenge the orthodoxy of their racial politics, and they branded him as the equivalent of a worthless devil worshiper—an integrationist. The May 1960 law school student body, attempting to ward off his being fired, adopted a petition of support for him, giving assurance that they, as the ones closest to his daily law school work, held Bill Murphy in high esteem for his admirable qualities, adding that he "never advocated integration."[12]

The 1954 letter had first identified Murphy as one who favored public education and adherence to law over strict racial segregation. In his subsequent academic and public policy writings, Murphy extended his insistence that states must obey

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[12] The text of the petition:

> We, the undersigned, members of the Law School Student Body at the University of Mississippi, do hereby petition the Legislature of the State of Mississippi to abandon the attack now being made on the Honorable William P. Murphy. Mr. Murphy has never advocated integration in any of his classes to the best of the knowledge of the undersigned. His teaching techniques are designed to create student participation, and perhaps it has been the statements made in this vein for which he has been critized (sic).
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> We, the undersigned, take this opportunity to publicly voice our complete faith, trust, and absolute confidence in the teaching ability and integrity of the Honorable William P. Murphy, Professor of Law at the University of Mississippi. His presence on the faculty is needed and the students desire that he be left alone and permitted to remain.

Resolution of "Student Body" of the University of Mississippi School of Law (May 28, 1960) (on file with the *Mississippi Law Journal*).

An accompanying statement of May 28, 1960, signed by the student body president recites that the petition was adopted by the "Student Body" for delivery to Professor Murphy and to Dean Robert J. Farley with authority "to publish the petition if, in his discretion, the need arise" including "a list of those who signed the petition." *Id.* This writer was one of 120 signers, more than two-thirds of the student body.

the Supreme Court rulings on race as on other matters. His continuing espousal of his position was an unbearable thorn in the side of the state's racially rabid right-wingers. They stepped up the pressure on his job. By 1960, the Citizens' Council had effective political control, abetted by the state's illegal Sovereignty Commission, Governor Ross Barnett, and the Jackson *Clarion-Ledger*. Perhaps frustrated at seeing their grand strategy about to crumble around them,[13] they insisted on, and got, Murphy's scalp.

Though Murphy had been recommended by Dean Farley in 1961 for the University's new policy on tenure for proven faculty members, the University president, Chancellor John D. Williams, pressured by University trustees and legislators, refused tenure for Murphy. Farley was totally steadfast in his support of academic freedom and a continued faculty position for Murphy. But Murphy was forced out. He moved on and his talents graced other venues—on the faculty at the University of Missouri School of Law through the 1960s before his appointment at the University of North Carolina School of Law. He enjoyed a long and illustrious career as a marvelous teacher and scholar—the best of the best.

IV. The Haunt of Intolerance and Retaliation

Those who wielded the political ax to rid the state of William P. Murphy robbed the state of far more than the services of a truly gifted law professor. The leaders of this group were lawyers and businessmen who had the advantages of schooling and experience. But they were infected with the politics of racial hatred espoused by James K. Vardaman and Theodore G. Bilbo, and they "led" by using the time-honored techniques of fascism. Ruthlessly, they used economic clout and the power of the state to teach indelible lessons of intolerance and retaliation. Sadly, they won. More sadly, their lessons of intolerance and retaliation were practiced far beyond Murphy

[13] After an extended court battle, public education in the state was racially integrated in October 1962; James Meredith entered the University of Mississippi under armed guard of the federal government.

and they yet haunt the state.

Two years after Murphy was dispatched in 1962, Dean Robert J. Farley met essentially the same fate at the hands of essentially the same forces for essentially the same reasons. Five years later they went after Farley's successor, Dean Joshua M. Morse, and again race was the text. Morse obtained for the law school a financial grant from the Ford Foundation to recruit African-American law students and to expose all law students to a new group of high-achieving faculty members whose ideas and ideals were those of the future, not the past. Morse had also garnered funds to establish a clinical program that provided legal services for the poor. When the program's lawyers represented Black clients in a school desegregation case, the straw broke. Morse, hounded unmercifully, soon was gone. His successor, installed as dean in 1969 over the faculty's objection, fired two of the new faculty and the others left.

During the 1950s and 1960s the politics of race had made the law school its whipping boy because of the school's boldness, courage, and visibility, notably in the persons of Murphy, Farley, and Morse. The political power of the reactionary group persisted unabated until the early 1970s when Governor William Waller, the first elected after the Voting Rights Act of 1965 took hold, eliminated the Sovereignty Commission and set a tone of moderation on race.

Nowadays the rhetoric of the state and the University speak of having embraced enlightenment. Whether the conversion is superficial or real is not tested by good times but only will be answered with a crucible as severe as the test it failed with Bill Murphy.

THE POLITICAL TAKEOVER OF A LAW SCHOOL: THE REAL TRAGEDY OF THE BILL MURPHY STORY

George Cochran[*]

Thanks to the scholarly contributions of Professors Charles Eagles,[1] and James Silver,[2] the horrific circumstances and poisonous environment that predominated at the University in general and the law school in particular before and after the Court's decision in *Brown v. Board of Education*[3] have been definitively analyzed. With gratitude, I will use this material to briefly review the specifics of Bill Murphy's "voluntary" resignation, and conclude with what I believe to be the long-term consequences of his decision.

As thoroughly described by William Winter, following *Brown* the state's "entire legal arsenal [including the state bar][4] and all [its] legislative ingenuity"[5] was committed to forestalling

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[*] Professor of Law.

[1] Charles W. Eagles, *"Thought Control" in Mississippi: The Case of Professor William P. Murphy*, 66 J. MISS. HIST. 151 (2004) [hereinafter *Case of William P. Murphy*]; Charles W. Eagles, *The Closing of Mississippi Society: Will Campbell, The $64,000 Question, & Religious Emphasis Week at the University of Mississippi*, 67 J. S. HIST. 331 (2001) [hereinafter *Closing of Mississippi Society*].

[2] JAMES W. SILVER, MISSISSIPPI: THE CLOSED SOCEITY (1964).

[3] 347 U.S. 483 (1954).

[4] One helpful fact (for purposes of the historical record) is that during the period now under review the *Mississippi Law Journal* devoted a yearly issue to the annual proceedings of the state bar.

[5] *See, e.g.,* William F. Winter, *Mississippi's Legislative Approach to the School Segregation Problem*, 26 MISS. L.J. 165, 165 (1955). Indicative of how consumed the legislature was with the issue is the fact that Winter felt the need to publish a detailed follow-up article two years after his initial offering. *See* William F. Winter, *Recent*

Brown's implementation. Aiding and abetting this concerted effort was Governor J.P. Coleman (taking office two years after *Brown*) who took the position that "the people of Mississippi have the right to demand that teachers expounding against our way of life be ousted," and that the closing of state colleges to prevent integration would be "as inevitable as the sunrise."[6] Carrying out the mandates of the Governor[7] and legislation relating to the governing of state universities was a compliant Board of Trustees for the Institutions of Higher Learning. This entity, as early as 1953, employed what it perceived as its statutory authority to deny access to African-American applicants[8] and speakers on campuses who "might advocate ideas and opinions subversive to Mississippi's way of life," i.e., "integration and communism."[9] Finally, in the background, the omnipresent political and economic force in the state: the White Citizens' Council.[10]

The Chancellor at the time, J.D. Williams, was "loyal to the trustees" and committed to the proposition that a university should "follow the mores of the community in which [it is] located."[11] In keeping with this philosophy, in 1956 he revoked a speaking invitation extended to a minister from Ohio who was a member of the NAACP.[12] The fact that Williams "yielded to

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Legislation in Mississippi on the School Segregation Problem, 28 MISS. L.J. 148 (1957).

[6] *Closing of Mississippi Society*, *supra* note 1, at 361 (citing CLARION–LEDGER (Jackson, Miss.), Feb, 15, 1956, at 1).

[7] That included those of Ross Barnett who, following the tenure of Governor Coleman, was in office from 1960 to 1964.

[8] In 1953, the Board voted to deny the application for the admission of Charles Dubra, an African-American from Gulfport. The next year a similar directive followed with respect to Medgar Evers. *Closing of Mississippi Society*, *supra* note 1, at 334.

[9] *Id.* at 335.

[10] *See* NADINE COHODAS, THE BAND PLAYED DIXIE 39-40 (1997) [hereinafter THE BAND PLAYED DIXIE] (explaining birth and influence of the Council); SILVER, *supra* note 2, at 35-42 (examples of Council activity); Sid Salter, *Talley Riddell Sr. Was Courageous During State's Civil Rights Era*, CLARION–LEDGER (Jackson, Miss.), Jan 30, 2008, at 7A (noting that Barnett "came to power [through an] identifiable political alliance with the old White Citizens Council").

[11] *Closing of Mississippi Society*, *supra* note 1, at 343.

[12] For an exhaustive examination of the incident, see *id.* *See also* THE BAND PLAYED DIXIE, *supra* note 10, at 44-48.

political pressure [and] had sacrificed academic freedom"[13] led to the resignation of Morton King, a professor in the sociology department.[14] This incident is viewed by some as marking the beginning of what the rest of the United States referred to as Mississippi's "closed society"[15] and, equally ominous, "the beginning of a more sustained challenge to academic freedom at Ole Miss."[16]

When Bill Murphy joined the faculty in 1953, he assumed a unique position: he was the only constitutional law professor in the state.[17] Less than a year later, he gained notoriety by

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[13] *Closing of Mississippi Society*, *supra* note, 1 at 370. *See also* SILVER, *supra* note 2, at 109 (noting Chancellor's position that the issue "was not the ditch to die in").

[14] *Closing of Mississippi Society*, *supra* note 1, at 358. Professor King concluded his resignation letter with the charge that the University was devoid of "such essential prerequisites of higher education as freedom of thought, inquiry, and speech." *Id.* The legislature responded by passing a resolution commending the Chancellor for accepting his resignation. THE BAND PLAYED DIXIE, *supra* note 10, at 46. Subsequently, the leader of the group that invited the speaker, the University chaplain, also tendered his resignation. *Closing of Mississippi Society*, *supra* note 1, at 365-66.

[15] *Closing of Mississippi Society*, *supra* note 1, at 370.

[16] THE BAND PLAYED DIXIE, *supra* note 10, at 48. One year later, *Time* magazine analyzed the situation following Chancellor Williams's decision as follows:

> At Ole Miss, professors chafed under the legislature's bullying, became increasingly resentful of the affidavits they were required to sign listing all organizations they had ever joined or contributed to. Some legislators demanded that every book on Negroes be banned from the university library. Others have kept up a running attack on Dean Robert J. Farley of the law school because he signed a document asking respect for the U.S. Supreme Court after its decisions against segregation. Worst of all, the anti-integration hysteria has become so pervasive that many students have become spies and informers for segregationists in the state, each keeping his own blacklist of suspects. "You can imagine," says one graduate student, "the frustration of those people who live in fear of being put on one of the lists. They spend their time talking about nothing but how much they favor segregation."

Concluded the *Delta Democrat-Times* from its interviews with the faculty: "The fact that it is almost impossible to get good replacements [for those leaving] makes the situation even more alarming. After all, prospective recruits reason, why come to Mississippi for less money and less freedom?" *Exodus From Ole Miss*, TIME, July 29, 1957, *available at* http://www.time.com/time/magazine/article/0,9171,825196,00.html.

[17] Interview by Sean Devereux with William Patrick Murphy, Reporter, Southern Oral History Program, in Chapel Hill, N.C. (Jan. 17, 1978), *available at* http://docsouth.unc.edu/sohp/html_use/B-0043.html [hereinafter *Murphy Interview*]. Led by Dean Farley, the law school was composed of a faculty that clearly placed it among the best in the United States for its size. It included John Fox (Mississippi College, University of Misissippi, Yale University), who had practiced in New York City

teaching the unremarkable proposition that since 1803,[18] the Supreme Court had ultimate authority to interpret the Constitution and that *Brown* was binding precedent.[19] Thereafter, he authored a series of book reviews and articles in the *Mississippi Law Journal* designed to make two points. First, there was a constitutional obligation to comply with *Brown*.[20] Second, the myriad of arguments proffered under the shibboleth of "states' rights" had no constitutional merit.[21] This

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and Jackson; J.W. Bunkley, Jr. (William & Mary, University of Mississippi, Yale University); Hector Currie (University of Mississippi, Yale University, Oxford University), who had practiced in Atlanta; Arthur B. Custy (University of Mississippi, Yale University); Harold G. Wren (Columbia University, Yale University, Fulbright Fellow), who had practiced in New York City; L.G. Fant, Jr. (Vanderbilt University, Harvard University); Corrine Bass (Newcomb College, Columbia University); Dean Farley (University of Mississippi, Yale University); and Professor Murphy (Southwestern College, University of Virginia), who had practiced in Washington, D.C. Robert J. Farley, *The School of Law—The First Hundred Years*, 25 MISS. L.J. 87, 90 (1954).

[18] *See Marbury v. Madison*, 5 U.S. 137 (1803).

[19] As explained in his 1978 interview:

> So I started out, really, in complete innocence, just doing what a constitutional law professor would have done anywhere in the country, and the only thing that made it unusual was the time and the place. They apparently wanted the Con Law course taught kind of like it would have been taught at a Citizens Council rally. . . . And I wasn't about to do that. But I didn't start out to take a stand or be a hero or anything like that. I got in hot water initially because of the way I taught the course.

Murphy Interview, *supra* note 17.

[20] *E.g.*, William P. Murphy, 26 MISS. L.J. 204, 205 (1955) (reviewing PAUL G. KAUPER, CONSTITUTIONAL LAW, CASES & MATERIALS) (condemning those members of the Mississippi bar publically expressing disdain for the Court's decision). During the same time frame, Dean Farley, speaking in his capacity as president of the state bar, included in his annual address a portion admonishing lawyers in the state that it violated the Canons of Professional Ethics to publicly attack the integrity of judges. Robert J. Farley, *Proceedings of the Fiftieth Annual Meeting of the Mississippi State Bar: President's Annual Address*, 26 MISS. L.J. 273, 276 (1954).

[21] For instance, he reviewed papers submitted at a major conference at Columbia on federalism pointing out that the "doctrine of states' rights [then espoused was] a deviation" from acceptable constitutional interpretation. William P. Murphy, *The Federal System at Mid-Century*, 27 MISS. L.J. 177, 181 (1956). Concluding, he recommended that bar members read a governmental report that contained "many actualities" that were "apparently forgotten in the midst of the unremitting denigration of the national government which is the stock in trade of many Southern politicians and publishers." *Id.* at 183. In yet another article in the same volume, he referred to attacks on *Brown* as having no "objective support in our constitutional history" and applauded the decision "because it eliminate[d] the legal sanction" of race discrimination. William P. Murphy, *Recent Books*, 27 MISS. L.J. 264, 264-66 (1956) (reviewing BERNARD

engendered a statewide firestorm of criticism unique in its breadth, scope, and intensity.[22]

For the academic year 1960-1961, Bill sought refuge elsewhere and accepted a position as a visiting professor at the University of Kentucky.[23] When he returned, he was offered a summer position on the condition that he not teach and told that the Board had also excluded his position from the budget for the coming academic year.[24] Before a meeting in which the Board was to reconsider its action, he was informed by a "sympathetic" member that if his contract were renewed

> some legislators had threatened to restructure the board of trustees, to close the law school . . . and create a new one elsewhere and to strip the board's financial control over the colleges by making separate appropriations directly for each college, in which the funding for the university would be drastically cut.[25]

Following the grant of another leave of absence[26] he was informed by the vice-chancellor that "both the board of trustees and [the Chancellor] thought the legislature would take action [to have him fired] if [he did] not resign by the following spring."[27]

During this distressfully brutal period, Bill received the

SCHWARTZ, AMERICAN CONSTITUTIONAL LAW (1955)).

[22] *Case of William P. Murphy*, *supra* note 1, at 179. For those interested in exploring in detail what Bill went through (in addition to Professor Eagles's contribution), see, e.g., THE BAND PLAYED DIXIE, *supra* note 10, at 51-56; MICHAEL DE L. LANDON, THE UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW, A SESQUICENTENNIAL HISTORY 92-96 (2006) [hereinafter cited as LANDON]. One of the most unseemly and unforgivable incidents was the decision to attempt to pressure Dean Farley to prohibit the *Mississippi Law Journal* from publishing any further articles authored by Bill. *See Case of William P. Murphy*, *supra* note 1, at 183. Equally deplorable was the callous disregard for academic freedom and the level of disdain felt by the Board of Trustees with respect to the faculty. One of many examples was the decision by the Board's executive secretary to refuse to accept a petition signed by the entire faculty in support of Bill on the basis that "the faculty did not run" the law school and did not want to make the Board angry. *Id.* at 190.

[23] *Case of William P. Murphy, supra* note 1, at 184.

[24] *Id.* at 187.

[25] *Id.* at 191.

[26] This time for a year at the University of Missouri. *Id.* at 192.

[27] *Id.*

support of the Dean,[28] the entire faculty,[29] and a major portion of the student body.[30] Whatever solace this provided, however, was destroyed when the Chancellor made it clear that he had no intention of carrying out his commitment to "recommend [him] for reappointment," if Dean Farley did.[31] It was at this point, after years of torment, that Bill resigned and accepted a position at the University of Missouri.

In an interview conducted in 1978, he pointed out that because Mississippi "had no history or tradition of insulation from political interference and domination"[32] he became

> the only constitutional law professor in any southern law school [or any other law school in the United States] who underwent a period of four-year controversy in which serious, sustained, prolonged efforts were made to get me fired or to force my resignation, and where it surfaced in the Alumni Association and the Legislature and the Board of Trustees of the University system. I know no other law professor went through that or anything comparable.[33]

In addition, he made the following point:

> I had second thoughts about whether or not I had done the right thing in resigning. Or whether or not it might have been better to have stayed there and continued to try to vindicate the principle of academic freedom .... I was in a unique position to do it. [Although it] would have resulted in a loss of accreditation of the Law School ... I [have] thought from time to time, [that it would have] been a better thing for the state to have had the ultimate confrontation ....[34]

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[28] *Case of William P. Murphy*, *supra* note 1, at 185 (Dean Farley taking the position that he would resign if Bill's contract was not renewed).

[29] *Id.* at 189 (petition to Board of Trustees signed by entire faculty deploring "political interference" with the law school).

[30] In May of 1960, 120 law students filed a petition with the legislature attesting to Bill's "teaching ability and integrity" and requested that it "abandon the attack now being made." *Id.* at 183.

[31] *Case of William P. Murphy*, *supra* note 1, at 195.

[32] *Murphy Interview*, *supra* note 17.

[33] *Id.*

[34] *Id.*

And therein lies the unanswered question: would it have been "a better thing" if Bill had provoked the "ultimate confrontation" against those dedicated to doing everything in their power to destroy his professional career?[35]

Following Bill's exit, a professor commented that "[i]f they get away with this one, there will be more."[36] And, of course, that is exactly what happened. Dean Farley, described by Bill as "a truly heroic figure,"[37] was forced to resign three years after his departure.[38] Dean Farley's successor, Joshua Morse III, laid the groundwork for his abbreviated tenure when he attracted visiting professors from Harvard, Yale, Columbia, and NYU.[39] Subsequently, after raising hundreds of thousands of dollars from public and private sources,[40] he added five full-time faculty members from Yale[41] and established the state's first legal services program serving lower income residents of North Mississippi.[42] The result—unremitting attacks by legislators condemning "out-of-staters" teaching "socialistic, if not Communistic, doctrines at the law school."[43]

Responding to "heavy pressure from the board of trus-

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[35] Perhaps the kindest reference to his enemies was his conclusion that those "people had just made up their minds they were going to stay ignorant. It was willful ignorance." *Murphy Interview*, *supra* note 17.

[36] *Case of William P. Murphy*, *supra* note 1, at 188-89.

[37] *See also* SILVER, *supra* note 2, at 113 (describing Dean Farley as a "giant of a man").

[38] *Murphy Interview*, *supra* note 17. *See also* Fred Powledge, *U. Of Mississippi Acts to Bolster Faculty as Professors Resign*, N.Y. TIMES, Aug. 15, 1983, *available at* http://select.nytimes.com/gst/abstract.html?res=F40C12FF355912718DDDAC0A94D0405B838AF1D3 (noting Dean Farley's resignation being brought about because he "taught integrationist doctrines").

[39] LANDON, *supra* note 22, at 105; *New Mood at Ole Miss*, TIME, Sept. 23, 1966, *available at* http://www.time.com/time/magazine/article/0,9171,842831,00.html.

[40] LANDON, *supra* note 22, at 105; THE BAND PLAYED DIXIE, *supra* note 10, at 118 (noting that grant from the Ford Foundation was described by the *Clarion-Ledger* as a "sell-out . . . to voluntarily negroize Ole Miss").

[41] For a detailed overview of the specifics of the new faculty and the generation of significant outside private funding during that period, see LANDON, *supra* note 22, 103-07.

[42] *Id.* at 111.

[43] *New Misery at Ole Miss*, TIME, Aug. 30, 1968, *available at* http://www.time.com/time/magazine/article/0,9171,844585,00.html.

tees,"[44] the new Chancellor, Porter Fortune, directed that no law professor doing part-time work with legal services (in contrast to other entities or persons) could be employed at the law school.[45] As a result, several resignations followed,[46] accompanied by the filing of a federal law suit by Professors Strickler and Trister.[47] With respect to Dean Morse, in July of 1969, *Time* magazine reported that "Morse too" had to go.[48] To force his exit, the Board denied him raises for three consecutive years,[49] and screened all faculty appointments.[50] In addition, the state bar altered its tradition of having the Dean treated as a "major figure" by not inviting him to speak at its annual convention.[51] Following this, he accepted a position as Dean at Florida State.[52]

Subsequently, the faculty voted 13-to-3 that, in addition to considering on-campus candidates, a nationwide search would be conducted for a new Dean.[53] At the time, Chancellor Fortune "repeatedly assured" the faculty "that he would not appoint a Dean unacceptable to them."[54] Thereafter, however, he selected Professor Joel Bunkley even though the faculty, by a vote of 11-to-5, found him unacceptable.[55]

Following Dean Bunkley's appointment, the Fifth Circuit reached its final decision in the case brought by Professors

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[44] LANDON, *supra* note 22, at 112. Or, as characterized by the *New York Times*, a "crackdown." *New Misery at Ole Miss, supra* note 43.

[45] LANDON, *supra* note 22, at 112; *New Misery at Ole Miss, supra* note 43.

[46] In addition, "[o]ut of state recruiting [was] curtailed and as the remaining outsiders move[d] on, they [were] not likely to be replaced." *New Misery at Ole Miss, supra* note 43.

[47] *See* Trister v. Univ. of Miss., 420 F.2d 499 (5th Cir. 1969).

[48] *A New Dean at Ole Miss,* TIME, July 18, 1969, *available at* http://www.time.com/time/magazine/article/0,9171,901064,00.html. *See also* THE BAND PLAYED DIXIE, *supra* note 10, at 126.

[49] *A New Dean at Ole Miss, supra* note 48; *see also* THE BAND PLAYED DIXIE, *supra* note 10, at 126.

[50] *A New Dean at Ole Miss, supra* note 48.

[51] *Id.*

[52] *Id.*; THE BAND PLAYED DIXIE, *supra* note 10, at 126.

[53] LANDON, *supra* note 22, at 113.

[54] *A New Dean at Ole Miss, supra* note 48.

[55] *Id.* As seen by a reporter for *Time* magazine, Dean Bunkley's main qualifications were being on the faculty for twenty-three years and, as he explained, "I am proudest of all of one thing: that I am a Mississippian." *Id.*

Strickler and Trister. Finding their terminations unconstitutional, the opinion made two points. First, contrary to the position taken by the bar, the Board of Trustees, and members of the legislature,[56] the court concluded that participation in the legal services program increased the "quality of instruction received by the students."[57] Second, it was a violation of the Equal Protection Clause to preclude legal work for legal services while allowing other types of outside employment.[58]

The response by the University to the opinion was remarkable. When he returned to the law school, Dean Bunkley offered Trister $20,000 ($120,000 today)—understood by Trister as a "payoff to keep [him] away."[59] Looking back at the incident, he concluded: "This shows the lengths they will go. I tried to discuss it with the chancellor after the Fifth Circuit ruling and he wouldn't even talk to me."[60]

CONCLUSION

This era in American history—Mississippi history—surely produced its share of tragic casualties. Lost lives among them. But Bill Murphy's experience is especially poignant. He was forced to choose between two evils: to stay and risk closure of the law school or leave and hope that something could be salvaged. He was forced to this decision by an institution that at the time held itself out as the state's bastion of academic freedom,[61] but that in fact was headed by cowardice and steered by demagoguery.

When each day is done, each year closes, and eras end, a law school, no matter what else it may have accomplished,

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[56] Trister v. Univ. of Miss., 420 F.2d 499 (5th Cir. 1969).

[57] *Id.* at 503.

[58] *Id.* at 504.

[59] Curtis Wilkie, *Ousted Professor Charges 'Payoff' Bid*, WASH. EVENING STAR, Dec. 26, 1969.

[60] *Id.* For a more detailed account of the Trister-Strickler episode, see LANDON, *supra* note 22, at 113-15 (concluding that an offer had been extended to Trister to be a "part time" member of the faculty with no right to vote).

[61] SILVER, *supra* note 2, at 108 (noting "bar of soap" advertising to promote an image divorced from reality).

should be able to say about itself that it stood for justice and the rule of law. The Bill Murphy resignation, followed by the loss of two outstanding Deans and a significant number of faculty members left a shell of a law school under the firm control of a University administration responsive to political forces committed to one and only one proposition: neither the rule of law nor academic freedom applied to the University of Mississippi. From this sordid period, however, there are those who—although paying a terrible price—found their place in history. And while history exacts a terrible price on the mind, it will record that while the school of law lost its way in the pursuit of justice and the rule of law, Bill Murphy and those suffering the consequences during that period, never did.

WILLIAM P. MURPHY: A REMEMBRANCE

*T. H. Freeland, III**

What obligation does a school of law and a professor of law owe to the future lawyers in his class to teach that when the U.S. Supreme Court construes the U.S. Constitution, that is the law of the land and must be obeyed? This article will attempt to address this issue through the eyes of Bill Murphy and those who knew him.

William Patrick Murphy, better known as "Bill," was either a born trouble-maker bent upon recruiting law students to do away with our "southern way of life" or a distinguished professor of constitutional law. It is well known that while teaching at the Ole Miss Law School Bill was accused by certain Mississippi politicians as well as members of the Mississippi Bar and other citizens of creating a generation of trouble-makers intent upon doing away with our "southern way of life" insofar as racial integration was involved. Apparently no Black voices were heard on the issue. It was claimed that a primary method used by Bill to accomplish this atrocity was teaching that when the U.S. Supreme Court held that what the U.S. Constitution meant and intended on that or any other subject was the law of the land and had been since that Court said so in *Marbury v. Madison*.[1] I suggest that any former Ole Miss law student who recalls John H. Fox, a.k.a. "the great white father," might consider that the designation "trouble-maker" applies to a great professor of law, but that is a subject for another day.

By way of background, Bill became a member of the Order

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* University of Mississippi School of Law, Class of 1958.

[1] 5 U.S. 137 (1803).

of the Coif while at the University of Virginia Law School where he was also an editor of the law journal. He clerked for a United States Court of Appeals judge immediately after graduating. Thereafter he worked for the United States Department of Labor for a time. He was then invited to teach constitutional law at the University of Mississippi School of Law by Dean Robert Farley. While at Ole Miss, Bill was awarded a Sterling Fellowship by the Yale University School of Law, where he earned his doctorate.[2] He was president of the National Academy of Arbitrators in 1986-1987, and was a recognized pioneer in that field, having been an active labor arbitrator since 1956. In 1988 the American Arbitration Association awarded Bill its Distinguished Service Award.[3]

It is true that Bill was "guilty" of teaching that the U.S. Supreme Court was the final arbiter of the meaning of the U.S. Constitution. Was he advocating segregation or integration? Or was Bill simply doing his duty as a professor of constitutional law? Whatever the answers to these questions may be, Bill Murphy wanted to remain at Ole Miss, and probably would have done so. What sort of law professor was Bill Murphy? Likely answers: After being "run away"[4] from the University of Mississippi in 1962, Bill went to a full professorship at the University of Missouri School of Law where he remained until 1971. Thereafter he was invited to teach at the law school at the University of North Carolina as a full professor. There Bill became a distinguished professor of constitutional law, occupying two different endowed chairs until his retirement in

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[2] Letter from William P. Murphy to Larry Franck, Murphy's student and member of class of 1958, in response to a letter from Franck and accompanying a longer letter (May 1, 2006) (on file with author) [hereinafter Franck letter]. *See also* Eric Muller, *The Embodiment of Academic Freedom*, CHRON. HIGHER EDUC. (Wash., D.C.), Dec. 7, 2007, at 11.

[3] William P. Murphy, Past Pres., Nat'l Acad. of Arbitrators, Speech at Annual Meeting of National Academy of Arbitrators in San Diego, Calif. (June 4, 1998) (on file with author and the *Mississippi Law Journal*) [hereinafter Murphy speech].

[4] *See Teacher, target of attacks, resigns post in Mississippi*, N. Y. TIMES, Aug. 6, 1962, at 22 ("A University of Mississippi law professor who has been the target of segregationists for several years has resigned to take a better position at the University of Missouri.").

1990, writing extensively for the *North Carolina Law Review* and receiving several awards as a distinguished professor of law. The North Carolina Law School class of 1990 endowed the William P. Murphy distinguished speakers program.

Eric Muller, a colleague at the University of North Carolina School of Law had this to say about Bill:

> The little article from the *Times* actually got things a bit wrong. Yes, powerful men in Mississippi went after Bill Murphy when he was at Ole Miss because he was a member of the ACLU. But that masked their real reason: Bill Murphy was a professor of constitutional law who refused to teach budding Mississippi lawyers that *Brown v. Board of Education* was an illegitimate ruling that should be resisted.[5]

Bill Murphy was not the only casualty at the law school. Dean Robert J. Farley, Dean since 1946, president of the Mississippi Bar Association in 1955, having a national reputation as a law teacher and a Dean, was denied the privilege of teaching at the Ole Miss Law School after retiring at age 65 in 1964 because he supported Bill Murphy consistently.[6]

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[5] Eric Muller, *The Embodiment of Academic Freedom*, CHRON. HIGHER EDUC. (Wash., D.C.), Dec. 7, 2007, at 11. Bill said he joined the ACLU because he wanted to see that organization's publications on constitutional law. Before doing so Bill asked Hugh Clegg, former Deputy Director of the FBI and then-Director of Development at the University, whether Mr. Clegg saw problems with the idea. Mr. Clegg said "Go ahead." *See* Murphy speech, *supra* note 3. Bill also points out in the speech just cited that his membership in the ACLU was known because it was required by a rule of the Board of Trustees to list all organizations of which he was a member, despite the U.S. Supreme Court having pronounced such a requirement unconstitutional.

[6] Although Dean Farley's principal "sin" was his unwavering support of Bill Murphy and with it academic freedom, he had other "problems" with his views. Anecdotal evidence of such: When invited to participate with a committee summoned by then-Governor Ross Barnett to determine the proper method of avoiding integration of the University of Mississippi by James Meredith, the Governor suggested that before convening the first meeting of the panel they should "call on the deity." Dean Farley responded, "Wait Ross. Before we do that perhaps we should decide whether God is on our side." Dean Farley also had a prior experience similar to that of Bill Murphy. In 1930 Dean Farley as well as Dean Thomas Kimbrough, John H. Fox of the law school, and Chancellor Alfred Hume and other faculty were fired by then-Governor Bilbo because they opposed Bilbo politically. Bilbo's actions caused the University to lose its accreditation. MICHAEL DE L. LANDON, THE HONOR & DIGNITY OF THE PROFESSION: A HISTORY OF THE MISSISSIPPI STATE BAR, 1906-1976, at 66 (1979). Dean Farley went to the Tulane University School of Law where he later became Dean. He returned to the

Dean Farley went on to teach at the University of Florida School of Law, where Ole Miss Law School graduate Roy Hunt was Dean. Hector Currie, a Harvard Law School graduate, Rhodes Scholar and outstanding professor of law, left the law school and went to teach at Louisiana State University by way of protesting what happened at Ole Miss.

Other legal minds may have been contaminated by White Citizens' Council standards, but not by Bill Murphy. The Honorable William H. Anderson, of Ripley, Mississippi, an Ole Miss Law School graduate in the early thirties and long-time chancellor, was handed a motion by a panel of lawyers formed by then-Governor Ross Barnett during the Meredith crisis to issue an injunction prohibiting the integration of Ole Miss. Judge Anderson called the Barnett Panel, gave them a piece of his mind, and stated he had no intention of heaping scorn on the State of Mississippi or his court by issuing a void injunction. Threatened with political retaliation, Judge Anderson told the committee to "come ahead."[7]

While there is no doubt that many Mississippians were opposed to the idea of integrating our schools, that is not the subject of this article. Bill Murphy did not advocate integration.[8] There were and are many Mississippi lawyers, some of whom were influenced by Bill Murphy, and many who did not have that privilege, who recognize that as members of the bar we have a duty to follow constitutional law as laid down by the U.S.

Ole Miss law school as Dean in 1946 after the death of Dean Kimbrough, who had been re-hired in that capacity. In contrast, in 1955 Dean Farley was elected President of the Mississippi Bar Association. *Id.* at 173. Dean Farley was talented in attracting highly competent faculty. When I started law school in 1951 three faculty members were Rhodes Scholars: Roscoe Cross, Walter Dunham, and Hector Currie. Later Parham Williams became Dean of the law school, and later was Dean of two different law schools. John Wade taught at the law school after graduating and subsequently was Dean of the Vanderbilt Law School.

[7] The author of this piece had the privilege of witnessing the exchange just described, having been asked to present the motion to Judge Anderson despite having refused to advocate the idea of enjoining the enforcement of a decree of the Court of Appeals for the Fifth Circuit. After being lectured by Judge Anderson regarding his disappointment that I would present him with such a motion, he graciously allowed me to explain that I was acting as a reluctant errand boy, not an advocate.

[8] *See* Murphy speech, *supra* note 3.

Supreme Court until that Court says otherwise, like it or not. Among these attorneys whose time at the Ole Miss School of Law preceded Bill Murphy was the Honorable William Winter, our former governor. William Winter has this to say about Bill Murphy:

> Every lawyer, indeed, every citizen of Mississippi owes a huge debt to a man that relatively few of us ever knew. His name was Bill Murphy, and he taught constitutional law in the Ole Miss law school in the 1950's and 1960's. At a time when our state was obsessed with the maintenance of racial segregation at almost any price, Murphy was teaching his students that as lawyers and as citizens they were obligated to respect and obey the decisions of our country's courts. That specifically included the *Brown* decision.
>
> For this he was ousted from his teaching position. It was not only a tragedy for him but to a much greater extent it was a tragedy for our state. If we had listened to Bill Murphy, we would have spared ourselves the catastrophic consequences that attended our state's defiance of the U.S. Constitution.
>
> We can now look to his courageous example as one which can serve as our guide through the constitutional quagmires of the future. Let us never forget the contributions which Bill Murphy has made to all of us who love our country and respect its laws.[9]

The Honorable Lenore Prather, Ole Miss Law School Class of 1954, former Chief Justice of the Mississippi Supreme Court and former chancellor, took constitutional law from Bill Murphy at the University of Mississippi School of Law. Justice Prather recalls Bill as a teacher of constitutional law who taught the subject as it was without advocating either side of the issues, emphasizing respect for the decisions of the U.S. Supreme Court on constitutional issues as the law of the land which other courts must follow.[10]

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[9] Letter from William Winter, former Gov. of the State of Miss., to Hal Freeland, III (Feb. 5, 2008) (on file with author and the *Mississippi Law Journal*).

[10] Telephone Interview with Lenore Prather, former Chief Justice, Miss. Supreme

The Honorable E. Grady Jolly, Ole Miss School of Law graduate and presently a judge on the United States Court of Appeals for the Fifth Circuit, another law student of Bill Murphy, stated that while Bill had pre-conceived notions about states' rights,[11] Bill was an excellent lecturer who taught straight constitutional law in a non-dogmatic way, legitimizing the power of the U.S. Supreme Court to express the law of this land.[12]

But what about the other Ole Miss law students, those exposed to Murphy's "radical" legal theories, and therefore, supposedly Murphy's victims? An effort was made to interview by telephone as many of those former law students who took constitutional law or other law school subjects under Bill Murphy, particularly those law students who had constitutional law after the decision of the United States Supreme Court in *Brown v. Board of Education*.[13] The principal inquiries were these: What evidences if any of bias against the "southern way of life" did Bill advocate? Was Murphy pro-integration and anti-racial segregation? How did Murphy teach constitutional law? In other words, was Bill Murphy a "trouble-maker" by Mississippi standards, or did he teach constitutional law as it then-existed?[14]

Court (Feb. 2008).

[11] Bill wrote his doctoral thesis on the subject as a Sterling Fellow at the Yale University School of Law while on sabbatical from the University of Mississippi School of Law. See the following Mississippi Law Journal articles which were reprints of a part of that thesis: *State Sovereignty Prior to the Constitution*, 29 MISS. L.J. 115 (1958); *State Sovereignty and the Founding Fathers I*, 30 MISS. L.J. 135 (1959); *State Sovereignty and the Founding Fathers II*, 30 MISS. L.J. 261 (1959). Incidentally, anyone fortunate enough to have been selected by Dean Farley to teach law at Ole Miss had a good chance of being selected as a Sterling Fellow because of Dean Farley's relationship with the Honorable Myers McDougal, the Sterling Professor at the Yale Law School. Dr. McDougal was a graduate of as well as a former professor at the Ole Miss School of Law. Incidentally Dr. McDougal claimed he became a law professor because he could not make a living practicing law in Booneville.

[12] Telephone Interview with E. Grady Jolly, Judge, U.S. Court of Appeals for the Fith Circuit (Feb. 2008).

[13] 347 U.S. 483 (1954).

[14] An admission of bias: I took every course Bill taught at Ole Miss except constitutional law, to which I had been exposed in 1951 during my first year of law school at Ole Miss. After graduating I was an adjunct professor at the law school while

The fact that a great majority of those law students at the University during Bill's time signed a petition supporting him as a professor of law is significant. Dean Farley told Bill that there was a "going away present" for him. The present was a petition that had been initiated by the law students and virtually every student in the law school had signed it.[15] The law faculty signed a similar petition.

Larry Franck, class of 1958, corresponded with Bill in April of 2006. Larry had this to say in a letter to Bill, a copy of which he provided:

> Through the years, I've often seen what a powerful, and good, influence you were, on me and many others. My law school years were among my happiest, in very large measure because of your mentoring. I remember with pleasure those evenings at your home when you had a few of us over to discuss a book or a topic outside our regular class work. I thank you for helping to shape my legal career.[16]

In preparation of this article, I have talked to many former law students who knew Bill Murphy as a professor of law. Uniformly, those I was able to talk to reflect Larry's sentiments.

A few examples:

The Honorable Ed Pittman, a former Chief Justice of the Mississippi Supreme Court, Secretary of State of the State of Mississippi, Attorney General of the State of Mississippi, and holder of other high offices, was a member of the Mississippi legislature while in law school. Ed Pittman defended Bill on the floor of the legislature.

The Honorable Neil Biggers, former Mississippi Circuit Court Judge and District Attorney, and presently a United States District Court Judge on senior status, says that Bill taught constitutional law as what the U.S. Supreme Court determined was the law of the land, and not as an advocate.

Parham Williams, a law student during Bill Murphy's time

Bill was there, and thereafter. The entire law school faculty supported Bill in his travail, as did the great majority of law students. I agree entirely with Larry Franck.

[15] *See* Murphy speech, *supra* note 3.

[16] *See* Franck letter, *supra* note 2.

and later professor of law and Dean of the law school, told me that he knew Bill Murphy as a law professor who did not advocate any particular view, but who taught constitutional law with the view that the decisions of the U.S. Supreme Court on constitutional issues were the law of the land and were bound to be followed as such.

These views are shared by other former law students who later became judges.

Every judge, or former judge, that was a student of Bill Murphy and who I was able to reach by telephone shared the views of Bill Murphy already espoused. These gentlemen included Honorable Woodrow Brand, a retired chancellor; Honorable Grey Evans, a retired circuit court judge; Honorable Donald Patterson (Judge Mouse), a retired chancellor; Honorable Norman Gillespie, a retired chancellor and United States Magistrate Judge; Honorable Shannon Clark, a retired chancellor; and Honorable Talmadge Littlejohn, a chancellor.

Judge Patterson had an interesting observation: A political science major, Judge Patterson had the good fortune to take a course in constitutional law from both the long-time head of the Department of Political Science, Dr. Howerton, as well as Bill Murphy. It was Mouse's view that Bill taught the subject as a reprise of Dr. Howerton's course, which he considered a great thing. All fortunate enough to have had Dr. Howerton's course in constitutional law will consider this high praise indeed. Shannon Clark observed that Bill Murphy, whom he considered to be an outstanding law professor, stood for the concept that every person is entitled to the due process of law, which is the most important fundamental right guaranteed by the U.S. Constitution. Similar views were held by every judge interviewed.

Finally, I was able to interview most of the former law students who had Bill Murphy for constitutional law. With one exception, all of them had fond memories of Bill as a law professor who had at heart the best interests of his students, teaching constitutional law as it was.

Thus, if we listen to those who were Bill's colleagues as well as his students, the Ole Miss Law School's loss was North

Carolina's gain. A fascinating thing about talking to this group is my experience that it is well nigh impossible to find any subject on which so many lawyers agree. I have learned third hand of one attorney, now deceased, who was of the opinion that Bill Murphy had no business teaching at the Ole Miss School of Law. Out of respect for the dead, he shall go nameless.

A TRIBUTE TO WILLIAM P. MURPHY: LABOR LAW TRAILBLAZER AND MAN OF UNFLINCHING PRINCIPLE

*Paul M. Secunda**

It is somewhat strange to write a tribute to a person that one has never had the pleasure to meet. Yet, I feel than I am compelled to write about a great man, William "Bill" Murphy, for in two significant ways he made my career as a law professor at the University of Mississippi School of Law a possibility.

As a *New York Times* article from 1962 notes, Bill started his career at the University of Mississippi School of Law in fall of 1953 and it ended unceremoniously in the summer of 1962.[1] At the commencement of Bill's tenure at the University of Mississippi, de jure school segregation was in its most wide-ranging form and "the powerful forces of segregation controlled public life in Mississippi and effectively made it the 'closed society.'"[2] In this social and political environment, Bill was not the most likely candidate to challenge this bankrupt way of life.

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* Jessie D. Puckett, Jr., Lecturer and Assistant Professor of Law. Professor Secunda has taught labor and employment law and civil rights class at the University of Mississippi School of Law since the fall of 2002.

[1] "A University of Mississippi law professor who has been the target of segregationists for several years has resigned to take a better position at the University of Missouri. William P. Murphy, attacked by legislators and others because he is a member of the American Civil Liberties Union, will become a full professor of law at Missouri Sept. 1. He has been at Mississippi since 1953." N.Y. TIMES, Aug. 6, 1962, at 22.

[2] Charles W. Eagles, *"Thought Control" in Mississippi: The Case of Professor William P. Murphy*, 66 J. MISS. HIST. 151, 151 (2004) (citing JAMES W. SILVER, MISSISSIPPI: THE CLOSED SOCIETY (1964)).

He had lived his entire life in the segregated South and hardly knew any people of color as a child.[3]

Bill did not set out to disturb the status quo in Mississippi, but his and many other people's lives changed in 1954 with the Supreme Court's unanimous decision in *Brown v. Board of Education*,[4] which famously held that "[s]eparate educational facilities are inherently unequal."[5] That decision, of course, struck down Southern school segregation as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Not surprisingly, the Southern states were outraged.[6]

A protégé of University of Mississippi Law School Dean Robert J. Farley, Bill worked with Dean Farley to fashion a moderate Southern response to the *Brown* decision. This was no easy task. But only six weeks after *Brown*, Bill took the bold move of outlining his ideas about how Mississippi could transition to a post-*Brown* world in a letter to the editor he wrote in the state's biggest newspaper, the Jackson *Clarion-Ledger*. Centered on the idea that the states were not free to ignore the valid decisions of the United States Supreme Court, he suggested instead Congress enact school desegregation legislation.[7] Consistent with the states' rights movement of the time, Bill advocated that states were best able to implement integration and that the constitutional authority of the federal courts should be limited in such matters, unless the states proved unable to implement the constitutionally-necessary change in public education.[8]

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[3] *Id.* at 155.

[4] 347 U.S. 483 (1954).

[5] *Id.* at 495.

[6] United States Senator James O. Eastland of Mississippi, for instance, stated at the time that *Brown* "strike[s] down all state laws which provide for racial segregation, and upon which the institutions, the culture and the civilization of the south was built." Eastland went on to say that, "The future greatness of America depends on racial purity . . . . Who says the South will not win?" Eagles, *supra* note 2, at 155 (citing James O. Eastland, OXFORD EAGLE, June 3, 1954).

[7] William P. Murphy, Letter to the Editor, CLARION-LEDGER (Jackson, Miss.), June 30, 1954.

[8] *Id.*

Now with 20/20 hindsight from the fifty years of history that followed *Brown*, it may seem to us naïve to believe that the Southern states would have willingly destroyed the foundations of their own society. But Bill sought to make the transition as painless as possible for his fellow Southerners and he would not accept talk about the illegitimacy of the Supreme Court or its constitutional holdings. He argued that his approach was "rational and temperate . . . which men of good will should be able to agree."[9] Of course, he was mistaken in his optimism, but his adherence to the rule of law and to his principles, when many others sought to avoid the racial situation altogether, was not only praiseworthy, but utterly courageous.

Around the same time as *Brown*, a less known, but an equally important development from this author's standpoint, was taking place in the area of federal labor law. Although the National Labor Relations Act[10] had guaranteed private sector employees' rights to organize and collectively bargain for twenty years, many in the South of that time thought that trade unionism was something akin to communism or even worse, since it seemed to promote racial equality.

As it happened, Bill had been hired by the University of Mississippi to teach labor law because he had relevant expertise in this area as a result of having been an attorney for the U.S. Department of Labor. The impetus for writing his first labor law article in the *Mississippi Law Journal* came with the passing of a "right to work" law by the Mississippi Legislature in February 1954. Such laws, as of the Taft-Hartley Amendments of 1947,[11] permitted states to prohibit by law employment agreements requiring membership in a union as a condition of employment.[12]

Bill did not set out to inflame fellow Mississippians with his law review article on right to work laws, but merely to explain how such statutes operated. As Professor Eagles notes, in Bill's

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[9] *Id.*

[10] 29 U.S.C. §§ 151-169 (2000).

[11] *Id.* §§ 141-144, 172-187.

[12] *Id.* §164(b).

article on "The 'Right to Work' Statute,"[13] "[he] wanted lawyers to understand how labor unions sought security, the arguments for and against such security measures, the origins of right-to-work laws, and the litigation that the laws had caused."[14] Murphy's commentary on these laws was unusually astute and he proved prescient when he observed that "a cheap, docile labor supply" in the South would attract industry which would inevitably lead to the rise of unionism in the region.[15] Indeed, in the last decade as Mississippi has been successful in luring the likes of Nissan, Toyota, and other large corporations, Bill's prediction about the eventual increase in unionism in this state no longer appears far-fetched.

Bill also realized, and stated more expressly in later writings, that the White power structure in Mississippi of the time was utilizing "right to work" laws to bolster the rights of business to the detriment of workers and to make unionization more difficult.[16] In a book review a few years later in the *Mississippi Law Journal*, Bill wrote that, "neither sustained experience nor objective study will support any 'devil' theory of unionism."[17]

Significantly, Bill used his position of prestige at the law school to state that labor unions were "legitimate, respectable, and important" institutions for the development of the South.[18] Although unions are still anathema to many in this region, his writings helped to raise the level of the dialogue immensely on this controversial topic.

Over the next few years, because of Bill's advocacy for justice in the schools and workplaces of the South, his career

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[13] William P. Murphy, *The "Right to Work" Statute*, 26 MISS. L.J. 39 (1954).

[14] Eagles, *supra* note 2, at 162.

[15] Murphy, *supra* note 13, at 60.

[16] Eagles, *supra* note 2, at 163 (citing Murphy, *supra* note 13, at 60) ("[Right-to-work laws were] one manifestation of an effort by Southern business and political leaders to obtain the benefits of industrialization without at the same time acquiring the disadvantages and evils, real or fictional, of labor unions.").

[17] William P. Murphy, *Review of The Practice of Unionism by Jack Bardash, and AFL-CIO: Labor United, by Arthur J. Goldberg*, 28 MISS. L.J. 170, 171 (1957).

[18] *Id.* at 171.

paid dearly. His ideas were attacked by rabid segregationists.[19] He was a heretic to his people and had to either conform to the racial status quo or leave the state. Leave the state he did, and Mississippi was lesser for it.

Even after Bill was forced to resign from the University of Mississippi in 1962, and then left the University of Missouri to join the law faculty at the University of North Carolina,[20] he continued to be a pioneer in the area of American labor and employment law. He was a member of the esteemed Labor Law Group of law professors that wrote many path-breaking casebooks in the areas of labor, employment, and employment discrimination law. He was also past president of the National Academy of Arbitrators and a well-regarded labor arbitrator, who heard cases throughout the country.

So, quite simply, Bill Murphy, a man I never met, is not only an inspiration to me, but a trailblazer who made it possible for me to write freely about civil rights, labor, and employment issues in the Mississippi of today. Without his moral convictions and his vision, my ability to continue the fight for workers' and students' rights would be unlikely to take place in this venue. In thanking Bill for his lifetime of achievement, I can only echo our mutual friend, Eric Muller, a professor of law at the University of North Carolina-Chapel Hill, who wrote shortly after Bill's passing: "If life ever deals me a chance to show the courage of my convictions, as it twice did Bill, I hope I will do it with my friend's silent guidance and blessing."[21]

Actually, I can go one step further than Professor Muller and state emphatically that I am truly embarrassed and

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[19] For instance, Professor Eagles notes that Murphy was attacked by the future leader of the White Citizens' Council, William J. Simmons, in a letter to the editor responding to his proposal. *Id.* at 159 (citing William J. Simmons, Letter to the Editor, CLARION-LEDGER (Jackson, Miss.), July 5, 1954). The White Citizens' Council is "an upscale, politically connected version of the Ku Klux Klan that formally renounce[s] violence but preach[es] white supremacy and the illegitimacy of *Brown*." Eric Muller, *The Embodiment of Academic Freedom*, CHRON. HIGHER EDUC., Dec. 7, 2007, at B11.

[20] John R. Bradley, *A Salute to William P. Murphy*, 77 MISS. L.J. 923, 928 (2008); George Cochran, *The Political Takeover of a Law School: The Real Tragedy of the Bill Murphy Story*, 77 MISS. L.J. 931, 936-37 (2008).

[21] Muller, *supra* note 19.

disturbed by the way the University of Mississippi treated a man of Bill's stature and integrity all those years ago in the name of racial purity. At least for my own part, I offer this tribute as a way to posthumously apologize for the unconscionable manner in which Bill was treated by this institution so many years ago and hope that his example will continue to be a shining light for those, like me, who believe in a Mississippi of the future.

WILLIAM FAULKNER, LEGAL COMMENTATOR: HUMANITY AND ENDURANCE IN HOLLYWOOD'S YOKNAPATAWPHA

Michael Allan Wolf[*]

I. INTRODUCTION: FAULKNER IN FILM AND LAW

William Faulkner's relationship with Hollywood and the film industry was as complex as Benjy's narrative in *The Sound and the Fury* and as tempestuous as a Snopes family reunion. The Nobel-prize winning novelist summed up the plight of the literary artist in Tinseltown, where he plied the trade of screenwriter for more than two decades, as nobody else could. He told the young southern writer, Shelby Foote, "'Always take the people seriously, but never take the work seriously. Hollywood is the only place on earth where you can get stabbed in the back while you're climbing a ladder.'"[1] Included among Faulkner's film credits are such forgettable titles as "Slave Ship" (1937)[2] and "The Land of the Pharaohs" (1955),[3] and classics

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[1] JOSEPH BLOTNER, FAULKNER: A BIOGRAPHY 447 (1991) (quoting Shelby Foote, *Faulkner's Depiction of the Planter Aristocracy*, *in* THE SOUTH AND FAULKNER'S YOKNAPATAWPHA: THE ACTUAL AND THE APOCRYPHAL 56 (Evans Harrington & Ann J. Abadie eds., 1977)).

[2] *See, e.g.*, *Melodramatic Romance Has Baxter and Beery in Costellar Roles*, WASH. POST, July 31, 1937, at 14 (film review of "Slave Ship").

[3] *See Faulkner Wrote This One With One Finger*, WASH. POST, July 1, 1955, at 42 (film review of "Land of the Pharaohs").

such as "To Have and Have Not" (1944)[4] and "The Big Sleep" (1946).[5] His troubled life on the Hollywood payroll has even been captured on celluloid—in 1991's "Barton Fink."[6] W.P. Mayhew (played by John Mahoney) is a lecherous, alcoholic, southern novelist-screenwriter who serves as an unforgettable symbol of the American writer's Sisyphean struggle to achieve financial security and popular acclaim while maintaining artistic integrity.[7]

Several filmmakers have attempted to bring Faulkner's novels and stories to the big screen, and the record there, as with Faulkner's screenwriting, is also uneven. Nine full-length, feature films appeared between 1933 and 1972: "Today We Live" (1933),[8] "The Story of Temple Drake" (1933, based on *Sanctuary* and *Requiem for a Nun*),[9] "Intruder in the Dust" (1949),[10] "The Tarnished Angels" (1957, based on *Pylon*),[11] "The Long Hot Summer" (1958, very loosely based on *The Hamlet*),[12] "The Sound and the Fury" (1959),[13] "Sanctuary" (1961, based on

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[4] *See* Bosley Crowther, *'To Have and Have Not,' With Humphrey Bogart, at the Hollywood—Arrival of Other New Films at Theatres Here*, N.Y. TIMES, Oct. 12, 1944, at 24 (film review).

[5] *See, e.g., Bogart-Bacall, Etc.*, WALL ST. J., Aug. 26, 1946, at 8 (film review of "The Big Sleep"). *See also* Howard Thompson, *Through Faulkner's View-Finder: The Nobel Prize Winner Scans His Career in Film Field*, N.Y. TIMES, Mar. 16, 1958, at X7.

[6] *See* Vincent Canby, *'Barton Fink,' a Dark Comedy from Joel and Ethan Coen*, N.Y. TIMES, Aug. 21, 1991, at C11 (film review) ("He [Fink] is befriended by another Capitol writer, W.P. Mayhew (John Mahoney). A drunken Southern novelist of Faulknerian dimensions . . . .").

[7] *Id.*

[8] *See* Mordaunt Hall, *Joan Crawford and Gary Cooper in the First Picture Derived from a Story by William Faulkner*, N.Y. TIMES, Apr. 15, 1933, at 16 (film review of "Today We Live").

[9] *See* Mordaunt Hall, *Miriam Hopkins and Jack LaRue in Pictorial Conception of a Novel by William Faulkner*, N.Y. TIMES, May 6, 1933, at 11 (film review of "The Story of Temple Drake").

[10] *See* Bosley Crowther, *'Intruder in the Dust,' M-G-M's Drama of Lynching in the South, at the Mayfair*, N.Y. TIMES, Nov. 23, 1949, at 19 (film review).

[11] *See* Bosley Crowther, *Faulkner Tale: 'The Tarnished Angels' at the Paramount*, N.Y. TIMES, Jan. 7, 1958, at 31 (film review).

[12] *See* Bosley Crowther, *'The Long, Hot Summer'; New Feature at Fine Arts and Mayfair; Story of the South Is Based on Faulkner*, N.Y. TIMES, Apr. 4, 1958, at 16 (film review).

[13] *See* Richard L. Coe, *Mildew Time Down in Dixie*, WASH. POST, Mar. 27, 1959, at

Sanctuary and *Requiem for a Nun*),[14] "The Reivers" (1969),[15] and "Tomorrow" (1972).[16] Two of these films—"Intruder in the Dust" and "Tomorrow"—are sensitive adaptations of Faulkner tales that are permeated with themes regarding the nature of justice, the role of the attorney, and the place of law and lawlessness in society. In many ways, a careful study of each of these two films (and of the novel and story upon which they are based) reveals that William Faulkner holds a place as an important American legal commentator.

It certainly is a tall order to demonstrate the veracity of that description, particularly because Faulkner was, technically, not a lawyer. I write "technically" because it is true that there is no record of his having ever studied in a formal law school program, taken a bar examination, or represented anyone in court as counsel. Indeed, Faulkner's efforts to enhance his pocketbook with big Hollywood contracts while forestalling his many creditors were most decidedly not the work of a trained attorney.[17] Still, it must be remembered that during Faulkner's early adulthood, it was not an uncommon practice for one to "read the law," under the guidance of a member of the bar.[18] There is evidence suggesting that Faulkner was at times a "law reader"—time spent in Phil Stone's Mississippi law office

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B13 (film review of "The Sound and the Fury").

[14] *See* Bosley Crowther, *'Sanctuary': Adaptation of Faulkner Novels Has Premiere*, N.Y. TIMES, Feb. 22, 1961, at 31 (film review).

[15] *See* Vincent Canby, *Faulkner Story Simplified: 'The Reivers' Presented at 3 Theaters*, N.Y. TIMES, Dec. 26, 1969, at 42 (film review).

[16] *See* Vincent Canby, *'Tomorrow': Adapted Faulkner Tale Directed by Anthony*, N.Y. TIMES, Apr. 10, 1972, at 44 (film review). For a review of a Malaysian adaptation of Faulkner's "Barn Burning," see Caryn James, *Faulkner, Set in Malaysia*, N.Y. TIMES, Apr. 6, 1996, at 19 (film review of "The Arsonist") ("Remarkably, this film is among the most faithful renderings of Faulkner ever brought to the screen."). *See also* KAKI BAKAR (1995), http://imdb.com/title/tt0110229/ ("Kaki bakar" is the film's title in Malay).

[17] *See, e.g.*, BLOTNER, *supra* note 1, at 302-03.

[18] "Reading the law" was a possibility in Mississippi until the 1980s. *See* MISS. CODE ANN. § 73-3-2(2)(a)(ii) (2004) (repealed 2006) ("That he has notified the Board of Bar Admissions in writing of an intention to pursue a general course of study of law under the supervision of a Mississippi lawyer prior to July 1, 1979, and in fact began study prior to July 1, 1979, and who completed the required course of study prior to November 1, 1984 . . . "). Virginia is one of a few states that still allows this alternative to the traditional law school route to bar membership. *See* VA. CODE ANN. § 54.1-3926 (2005).

perusing (perhaps even studying) law books;[19] hours spent observing courtroom proceedings and engaging in detailed discussions with Stone and other practicing attorneys about interesting legal disputes;[20] and, of course, the vivid descriptions of legal proceedings and issues that permeate the history of Faulkner's mythical Yoknapatawpha County and its environs. Examples of the latter include the murder trial in *Sanctuary*, the legal and moral implications of the death resulting from an illegal abortion in "The Wild Palms" (part of *If I Forget Thee, Jerusalem*), the arson proceedings and tort lawsuit in *The Hamlet*, the debate over capital punishment in *Requiem for a Nun*, and Gavin Stevens's legal detective work throughout the stories in *Knight's Gambit*. There are several more examples drawn from the novels and short stories throughout Faulkner's career.[21]

That Faulkner would be interested in legal themes and the practice of law should not be surprising, given his origins, his surroundings, and his times. Faulkner came from a family of lawyers and judges, including his legendary great-grandfather, Colonel William Clark Falkner; his grandfather, John Wesley Thompson Falkner; his uncle, Judge John Falkner; and his brother Jack, who studied law at the University of Mississippi.[22] As a boy, Faulkner learned that legal training was a great advantage for one with political, business, and literary aspirations. He socialized with lawyers and law students; law student Stone took a precocious Faulkner (he was four years younger than Stone) under his wing to engage him in a wide range of esoteric pursuits.[23]

In the early decades of the twentieth century, law and legal institutions played key roles in determining the character of the

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[19] *See* Morris Wolff, *Faulkner's Knowledge of the Law*, 4 MISS. C. L. REV. 245, 246 (1984). *See also* SUSAN SNELL, PHIL STONE OF OXFORD: A VICARIOUS LIFE (1991); Susan Snell, *Phil Stone and William Faulkner: The Lawyer and "The Poet,"* 4 MISS. C. L. REV. 169 (1984) [hereinafter Snell, *Stone and Faulkner*].

[20] *See* Wolff, *supra* note 19, at 245-46.

[21] For an interesting study that considers several Faulkner works, see JAY WATSON, FORENSIC FICTIONS: THE LAWYER FIGURE IN FAULKNER (1993).

[22] *See* BLOTNER, *supra* note 1, at 4, 10, 25-28, 74, 86-87, 112.

[23] *See, e.g.*, *id.* at 43-47; Snell, *Stone and Faulkner*, *supra* note 19, at 171-85.

American South, and Mississippi in particular. Some of the most prominent examples of American legal apartheid were Jim Crow laws segregating the races in public accommodations,[24] laws that forbade interracial marriage and that defined who was white and who was not,[25] the denial of voting rights and jury duty to African Americans,[26] and state-mandated school segregation.[27] Notorious demagogues such as Theodore K. Bilbo and James K. Vardaman championed the cause of white supremacy and played on the fears and suspicions of the state's most vulnerable white citizens.[28] Race was much more than a social construct in Faulkner's world: it was a stark and ubiquitous product of law—formal and informal. Questions of racial identity and its effects on interpersonal relationships drive the plots of such Faulkner masterpieces as *Light in August* and *Absalom, Absalom!*.[29]

The sharp disparity between the conditions of whites and blacks was not the only division defined in large part by law. Legal institutions made it hard, though not impossible, to bridge the gap between rich and poor, between the landed gentry and dirt-poor farmers. The key difference between Flem Snopes and his less-successful relations lay in the way he maneuvered through the gaps in the formal legal system, although in *The*

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[24] The leading case is, of course, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding state law mandating "that all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races").

[25] Virginia's ban on interracial marriages was struck down in *Loving v. Virginia*, 388 U.S. 1 (1967).

[26] The Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437, was designed to redress decades of animosity directed toward African Americans and other minorities who sought to exercise their rights in the voting booth.

[27] Sometimes a simple citation will suffice: *Brown v. Board of Education*, 347 U.S. 483 (1954). For a recent, comprehensive account of the Supreme Court's uneven record in combating racial discrimination by law, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

[28] *See, e.g.*, A. Leon Higginbotham, Jr. & William C. Smith, *The Hughes Court and the Beginning of the End of the "Separate But Equal" Doctrine*, 76 MINN. L. REV. 1099, 1116 n.74 (1992).

[29] For a provocative exploration of questions of black and white in Faulkner's extended family, see JOEL WILLIAMSON, WILLIAM FAULKNER AND SOUTHERN HISTORY 22-29 (1993) ("A Shadow Family in the Falkner yard").

Mansion he met his demise at the hands of a relative who suffered greatly from Flem's manipulations.

No writer (before or since Faulkner) captures so vividly and so truly the moral predicament of an American South that pursued official racism as it continued to suffer from (indeed found glory in) its failed crusade of rebellion, and the profound nobility of seemingly ordinary individuals whose endurance, pride, and simple humanity take on mythic proportions. The film adaptations of the novel *Intruder in the Dust* and the short story "Tomorrow" transmit these crucial aspects of Faulkner's written words to the screen, while challenging some basic beliefs regarding our legal system.

II. Lucas Beauchamp for the Defense

In the first few months of 1948, Faulkner composed *Intruder in the Dust*; the novel was published by the fall.[30] The novel presents the predicament of Lucas Beauchamp, a very proud and independent man of black and white ancestry who is jailed for the murder of a white man and faces the wrath and madness of a gathering lynch mob. Fully aware that the attorney, Gavin Stevens (he is named John Gavin Stevens in the film), will be unable to see through his own whiteness long enough to consider Beauchamp's innocence, Beauchamp enlists the aid of Stevens's teenage nephew—Charles "Chick" Mallison. Chick, who owes a debt to Beauchamp as a result of an embarrassing incident a few years before (Chick had attempted to pay Beauchamp for rescuing the boy after he fell into icy water), has not yet reached the age when he would process Beauchamp's story through the critical filter of a white, southern, adult male. Therefore, Chick—in concert with an African American youth and an elderly white woman—literally digs up the evidence that ultimately leads to Beauchamp's release: there is a different body in the victim's grave. Later, when the sheriff and Stevens inspect the grave, the second body has been removed by the actual murderer. Beauchamp is then released from jail so he can serve as bait in order to catch the

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[30] *See* Blotner, *supra* note 1, at 490-96.

murderer—the first victim's brother.

In the late 1940s, American screenwriters and directors tackled difficult social problems, sometimes with critical and popular acclaim. Two Elia Kazan films—"Gentleman's Agreement" (1947),[31] a clever expose of anti-Semitism that won Academy Awards for its director and producer,[32] and "Pinky" (1949),[33] the travails of a light-skinned African American woman who "passes" for white—typify the genre. 1949's "Intruder in the Dust," directed by Clarence Brown and based on a screenplay by Ben Maddow,[34] tackles an equally compelling social problem—the racial injustice that infects the American legal system.

Brown, who earlier in the decade had directed such films as "The Yearling" (1946) and "National Velvet" (1944),[35] worked closely and smoothly with Faulkner, who successfully lobbied for a different actor to play the murderer.[36] This was one of the last films of Brown's career, which stretched back to silent films and included the 1927 classic, "Flesh and the Devil," featuring Greta Garbo.[37] Faulkner tinkered with Maddow's script slightly (apparently with Brown's encouragement),[38] but the dialogue already closely followed the original. Maddow collaborated with John Huston on the screenplay for 1950's "The Asphalt Jungle."[39] Later in the decade, blacklisted as a result of his leftist politics, Maddow reportedly used a front to continue his

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[31] *See* Bosley Crowther, *'Gentleman's Agreement,' Study of Anti-Semitism, Is Feature at Mayfair—Gregory Peck Plays Writer Acting as Jew*, N.Y. TIMES, Nov. 12, 1947, at 36 (film review).

[32] *See Loretta Young Wins '47 Oscar in Upset*, WASH. POST, Mar. 22, 1948, at 12 ("Fox's 'Gentleman's Agreement' was voted by 1933 academy members as the best picture, . . . Elia Kazan as top director . . . . ").

[33] *See* Bob Roy, *'Pinky' Turns Other Cheek in Parade of Problem Films; This Time the Girl is the Non-Grey Eyes*, CHICAGO DEFENDER, Nov. 26, 1949, at 26 (film review).

[34] *See* Crowther, *supra* note 10, at 19.

[35] *See Clarence Brown, Movie Director Since 1920, Dies*, WASH. POST, Aug. 19, 1987, at C11 [hereinafter *Clarence Brown*].

[36] BLOTNER, *supra* note 1, at 502.

[37] *See Clarence Brown*, *supra* note 35, at C11.

[38] BLOTNER, *supra* note 1, at 502.

[39] *See* Richard L. Cos, *'Asphalt Jungle', A Dry Ice Chiller*, WASH. POST, June 16, 1950, at C9 (film review).

screenwriting on films such as "God's Little Acre."[40]

MGM's filming of "Intruder in the Dust" itself—on location in and around Oxford, Mississippi, Faulkner's home and the inspiration for Jefferson—raised some practical difficulties, given the novel's decidedly negative view of the lynch mob phenomenon and the racial make-up of the cast. Tennessee-born-and-educated Brown assured the local newspaper, "'We can make this film the most eloquent statement of the true Southern viewpoint of racial relations and racial problems ever sent out over the nation.'"[41] Black actors and actresses were housed in the homes of prominent local African Americans.[42] The toughest social challenges during the filming in March and April of 1949 were posed by Juano Hernandez, the Puerto Rico native who was selected to play Lucas Beauchamp (and who would later appear in such films as 1965's "The Pawnbroker"[43]), the proud man of mixed racial heritage who was wrongly accused of murder. First, because Faulkner thought that Hernandez sounded too Shakespearean, the novelist worked with the actor to imitate a Mississippi accent.[44] Second, because it would not have been fitting (under the prevailing, white mores of the Deep South of the 1940s) for the novelist to entertain Hernandez's nonwhite hosts, the lead actor did not attend a reception for the

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[40] Philip Yordan was apparently Maddow's front:

> The best-known of the "surrogates," and one of the first blacklistees to join the Yordan payroll, was the poet, documentarist, and screenwriter Ben Maddow . . . . Introduced to Yordan through Irving Lerner, . . . Maddow had adapted *Intruder in the Dust* and *The Asphalt Jungle* for MGM before finding himself persona non grata at the studios because of left-wing affiliations. Out of work under his own name, he was grateful to Yordan for the opportunity to "write underground," and Maddow is credited in various film encyclopedias as having scripted such Yordan-signed films during the 1950s as *Johnny Guitar*, *The Naked Jungle* (1954), *Men in War* (1957), *God's Little Acre* (1958), and two directed by Lerner, *Man Crazy* (1953) and *Murder by Contract* (1958).

PATRICK MCGILLIGAN, BACKSTORY 2: INTERVIEWS WITH SCREENWRITERS OF THE 1940s AND 1950s 332 (1997). *See also* http://imdb.com/name/nm0534693/ (listing Maddow as the screenwriter for several films otherwise credited to Yordan).

[41] BLOTNER, *supra* note 1, at 502 (quoting OXFORD EAGLE, Feb. 3, 1949).

[42] BLOTNER, *supra* note 1, at 502.

[43] *See* Bosley Crowther, *'The Pawnbroker' Opens at 3 Theaters*, N.Y. TIMES, Apr. 21, 1965, at 51 (film review).

[44] BLOTNER, *supra* note 1, at 503.

movie crew at the Faulkner home.[45] In October, the movie premiered at Oxford's Lyric Theatre, much to the delight of many Oxonians who appeared as extras in the film.[46]

New York newspaper advertisements declared that, just as "Birth of a Nation" and "Gone with the Wind" had "created a sensation" in 1915 and 1939, "Intruder" "gives the dramatic answer in 1949."[47] The *Newsweek* reviewer praised Brown for the film's "bitingly accurate portraiture" and for the way he "wisely avoided romanticizing a problem Southern communities have all too often been faced with."[48] Nevertheless, the reviewer was somewhat puzzled by why Miss Haversham would "risk her life and reputation for" the "magnificently intractable Lucas."[49]

While it might have sold tickets, the decision to place "Intruder in the Dust" in the same category as "Birth of a Nation" and "Gone with the Wind" betrays the filmmaker's (and novelist's) intent. While all three films have the South and racial issues at their core, Brown's film—because the screenplay tracks so closely with the novel, and because it captures the place and people that are Mississippi—is a major departure from those two classic (and decidedly racist) looks back at the evils that plagued the South following the Civil War.

We know from the automobiles of the townspeople who gather from the carnival atmosphere preceding the anticipating lynching that this story is set several decades after Reconstruction. Chick's generation is being challenged to confront head-on the self-inflicted pain of racism in the 1940s. Unlike his father and uncle, Chick is too young to have fallen

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[45] *Id.*

[46] Blotner writes:

> On Sunday night, October 9, the white-blue beam of an eight-million-candlepower searchlight probed the sky above the [Oxford] square. Three smaller ones threaded bands of light over the courthouse and a dozen more bathed the front of the newly painted Lyric Theatre to illuminate the square for newsreel cameras. The *Eagle*'s banner headline proclaimed WORLD PREMIERE EXCITEMENT READY TO BREAK.

BLOTNER, *supra* note 1, at 508.

[47] *See, e.g.*, N.Y. TIMES, Nov. 16, 1949, at 39; N.Y. TIMES, Nov. 21, 1949, at 29.

[48] NEWSWEEK, Dec. 5, 1949, at 81-82.

[49] *Id.*

under the spell of Populist demagogues and to have grown tired of calls for racial justice by northerners who faced their own problems with social integration. More importantly, Chick's personal contact with Beauchamp—he fruitlessly tries to even the score with this imposing, prideful man whom he had once humiliated in Beauchamp's own home—prevents him from making the otherwise "natural" assumption that Beauchamp was responsible for the death.

It is easy to view the film as a somewhat one-dimensional condemnation of lynching and mob mentality. Indeed, given the year of the film's release, "Intruder in the Dust" would deserve the kind of acclaim it received for that aspect alone. Stevens (played by David Brian, who later played a lawyer on television in "Mr. District Attorney"[50]) instructs Chick that one of Chick's neighbors, who offers to aid the lynching crew,

> has nothing against Lucas. He'll probably tell you he likes him better than he does a lot of white folks, and he'll believe it. All he requires is that Lucas act like a Negro, which he believes is what must have happened. Lucas blew his top and murdered a white man. Now the white folks are going to take him out and burn him—no hard feelings on either side. In fact, Mr. Lilley will probably be one of the first to contribute cash money to Lucas's funeral and the support of his widow and children if he had any.[51]

I would imagine that many non-southern viewers—especially then, but even now—would find some solace in hearing the Mississippi accents of the lynch mob, as these viewers could assure themselves that they would never act as uncivilized as their backward distant cousins. Yet, to focus on the "accurate portraiture" of Faulkner's neighbor extras is to miss the broader message Brown and Faulkner are conveying about the difficulties of achieving racial justice in America.

The first key scene is Beauchamp's initial conversation with

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[50] *See* Eric Pace, *David Brian, 82, Actor Is Dead: Starred in 'Mr. District Attorney,'* N.Y. TIMES, July 19, 1993, at B8.

[51] INTRUDER IN THE DUST (Metro-Goldwyn-Mayer 1949) [hereinafter INTRUDER, MGM]. The quotations from the two films discussed in this essay—"Intruder in the Dust" and "Tomorrow"—derive directly from the films themselves, not from the scripts.

Stevens in the jail, in which the defendant raises the question of representation by counsel:

> Beauchamp: Then you can take my case?
>
> Stevens: Take your case? What do you mean? Defend you before the judge?
>
> Beauchamp: I'm gonna pay you. You don't have to worry.
>
> Stevens: I don't defend murderers who shoot people in the back.
>
> Beauchamp: Let's forgit the trial. We ain't come to it yet. Now I wants to hire somebody. Don't have to be no lawyer.
>
> Stevens: To do what?
>
> Beauchamp: Is you or ain't you going to take the job?
>
> Stevens: I'd already taken your case before I came in here. I'm going to tell you what to do as soon as you've told me what happened . . . .
>
> Beauchamp: So you don't want the job?
>
> Stevens: No. But I'll do it just the same. Now tell me exactly why you killed Vincent Gowrie . . . .
>
> Beauchamp: Is you or ain't you going to take the case?
>
> Stevens: You haven't got a case. You, Lucas Beauchamp, took a pistol and went to straighten out a wrong between two white men. What did you expect? What else did you expect? You don't want justice. You want mercy . . .
>
> Stevens: Now, you listen to me. I'm going to get you tried in another county. Persuade the district attorney out there since they don't know you, that you're an old man, never been in trouble before. You'll plead guilty [Beauchamp quickly lifts his

> head and glares at Stevens] and throw yourself on the mercy of the court, and hope they send you to the penitentiary where you'll be safe from the Gowries . . . . You want me to stay in here with you tonight?
>
> Beauchamp: I reckon not. They kept me up all last night. I'm gonna try to get some sleep. If you stay here, you'll talk 'til morning.
>
> Stevens: Right.[52]

Today, law schools train their students to listen actively; instructors caution budding lawyers not to impose their will on clients.[53] Stevens abuses his role as legal adviser and treats Beauchamp not as an intelligent equal, but as a child. Moreover, Stevens gratuitously assumes the guilt of his potential client, a fact that Beauchamp has anticipated—and that explains his reticence in part.

It is only when Stevens leaves the jail that Beauchamp begins his legal (self-)defense. Taking advantage of Chick's feelings of guilt and obligation, and with full knowledge that Chick is not too old to assume the innocence of an accused

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[52] INTRUDER, MGM, *supra* note 51.

[53] *See, e.g.*, Thomas L. Shaffer & Robert F. Cochran, Jr., *"Technical" Defenses: Ethics, Morals, and the Lawyer as Friend*, 14 CLINICAL L. REV. 337 (2007). Professors Shaffer and Cochran, two of the most prominent champions of a nontraditional advocacy approach, provide this background:

> In our book, *Lawyers, Clients, and Moral Responsibility* [1994], we suggest four ways in which a lawyer might deal with a decision during legal representation which has negative implications for people other than the client. The godfather lawyer ignores the interests of other people, keeps the issue to himself, and does what he thinks will benefit the client. The hired gun defers to whatever the client wants to do. The guru considers the interests of other people, and controls the decision by aggressively persuading the client to do what the lawyer believes to be the right thing. The approach we recommend, the practice of our preferred lawyer, the lawyer as friend, raises the moral issue with the client, engages the client in moral conversation, and seeks to arrive at moral decisions with the client. Only when the client insists on doing something the lawyer believes to be wrong—only, that is, when moral conversation fails—would the lawyer-as-friend insist on following his own conscience.

Id. at 337 (footnote omitted). Gavin Stevens was clumsily attempting to play the role of "guru," not "friend."

African American, Beauchamp uses Chick to secure the truth that will literally set Beauchamp free. When Chick returns to the hallway outside the cell a few minutes later, Beauchamp asks Chick to dig up the victim's grave. Chick whispers through the iron lattice: "But, why me? Why you pick on me? What can I do about it?" Beauchamp responds, "Cause you ain't cluttered. You can listen. But a man like your uncle, he ain't got time. He's too full of notions."[54]

Brown captures this essential connection between Beauchamp and Chick with a striking camera shot of the black and white hands nearly touching through the cell door. Faulkner's description of this important connection matches the impact of the scene on the screen:

> Lucas did so, approaching, taking hold of two of the bars as a child stands inside a fence. Nor did he remember doing so but looking down he saw his own hands holding to two of the bars, the two pair of hands, the black ones and the white ones, grasping the bars while they faced one another above them.[55]

Chick is moved by Beauchamp's humanity, and this profound feeling is motivation enough to undertake the grave digging adventure.

The second important legal "lesson" imparted by "Intruder in the Dust" is the pernicious evil embodied in laws, written and unwritten, that define racial identity and mandate the separation and differential treatment of individuals based on that identity. Beauchamp attracts hatred and resentment from the whites of Yoknapatawpha because he refuses to play the subordinate role assigned to him and others with African heritage. In the middle of their initial "interview," Stevens asks, "Lucas, has it ever occurred to you that if you just said 'mister' to white people and said it like you meant it, you might not be sitting here now?" Beauchamp answers with the perfect amount of sarcasm, "So I'm to commence now. I can start off by saying 'mister' to the folks that drags me out of here and builds a fire

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[54] INTRUDER, MGM, *supra* note 51.

[55] WILLIAM FAULKNER, *Intruder in the Dust*, *in* NOVELS 1942-1954, at 335, 335 (1994).

under me?"[56]

Like Tom Robinson, the falsely accused rape defendant in *To Kill a Mockingbird*,[57] Beauchamp finds himself facing serious criminal charges in a legal system irretrievably tainted by racism and distrust. Unlike Harper Lee's pitiful victim, Beauchamp manipulates and persuades the white people around him in order to find justice and vindication outside the formal system.[58]

There is one white person who believes in Beauchamp's possible innocence—Eunice Haversham, one of Stevens's clients, who happens to be in the lawyer's office when Chick reports on his meeting with Beauchamp. She accompanies Chick and his young friend, Aleck, to the graveyard in the dark of night. (One of the unfortunate aspects of the film is that Brown chooses to use Aleck as his comic foil, for the young African American actor is called upon to react in the stereotypical fashion of a minstrel show.)

When the three adventurers report their findings to Stevens and the sheriff, Stevens asks himself why he didn't believe in Beauchamp's innocence and Miss Haversham why Beauchamp "didn't trust me with the truth."[59] Her answer and Stevens's response echo Beauchamp's earlier observation:

> Miss Haversham: You're a white man. Worse than that you're a grown white man.
>
> Stevens: Oh yes, I've heard that before, too. I heard Aleck's grandfather tell Chick and Aleck that once. If you want to get anything done, don't bother the men folks with it. They're too cluttered up with facts. Get the women and children to workin'

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[56] INTRUDER, MGM, *supra* note 51.

[57] HARPER LEE, TO KILL A MOCKINGBIRD (1960).

[58] For a provocative comparison of the lessons imparted by Lee's Atticus Finch and Faulkner's Gavin Stevens, see Rob Atkinson, *Liberating Lawyers: Divergent Parallels in* Intruder in the Dust *and* To Kill a Mockingbird, 49 DUKE L.J. 601 (1999). Atkinson argues, very much against the prevailing tide, "that Faulkner's *Intruder* should displace Lee's *Mockingbird* in the canon of lawyers' inspirational literature." *Id.* at 610.

[59] INTRUDER, MGM, *supra* note 51.

on it. Is that what you meant?[60]

Once again, the lawyer demonstrates that, although he can hear, he does not listen. Then, in an especially revealing moment, Stevens acknowledges that he has been lacking another sense, too: "It's more than that. There's a wall grown up between us. Lucas can't see through it and I won't. Well, maybe that's wrong. We're the ones who can't see through it because we're the ones who are blind."[61]

While Brown and Maddow take some liberties with the plot (the visits to the graveyard and the way the murderer is trapped are, not surprisingly, more complicated in the novel), the film's ending resembles Faulkner's version. A freed Beauchamp, dressed in his going-to-town clothes, carrying his white ancestor's pistol, and chewing on his gold toothpick, visits Stevens's office to even his account. Stevens refuses to accept attorney's fees and won't allow Beauchamp to pay Chick, because that would be "practicing law without a license."[62] So, Beauchamp settles for paying Stevens two dollars' worth of expenses—for a broken pipe (in the novel, it is a fountain pen). Still proud, Beauchamp counts out his change and requests a receipt. While the novel ends with that request, the film closes with Chick and Stevens observing, in Stevens's words, a "proud, stubborn insufferable" Beauchamp meander through a crowd of white folks: "But there he goes: the keeper of my conscience." "Our conscience," corrects Chick, just before the inspirational music rises.[63] Beauchamp has remained a constant throughout the film, but Stevens has learned an important lesson about not letting "notions" and "facts" get in the way of truth and justice. We can hope that, by questioning his assumptions and listening more carefully, Stevens will become a better lawyer and citizen so that he can aid his region in the coming, often bloody, struggle for equality.

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[60] INTRUDER, MGM, *supra* note 51.

[61] *Id.*

[62] *Id.*

[63] *Id.*

III. A PEERLESS JUROR

In 1940 Faulkner wrote "Tomorrow," a short story about Gavin Stevens that is narrated by Chick; *Saturday Evening Post* accepted the story in the summer of 1940.[64] The story was later included in a slim volume of Gavin Stevens detective stories entitled *Knight's Gambit*.[65] In fact, Faulkner completed the collection in 1949, between the time he finished *Intruder in the Dust* and the release of the filmed version of that novel.[66]

"Tomorrow" begins with Stevens's unsuccessful defense of a "solid, well-to-do farmer"[67] named Bookwright, who is reluctantly charged by the district attorney with the killing of Buck Thorpe (also known as Bucksnort). Thorpe is described as "kinless, who had appeared overnight from nowhere, a brawler, a gambler, known to be a distiller of illicit whiskey" and a cattle thief.[68] Bookwright admits that he had shot Thorpe in an effort to save his seventeen-year-old daughter from running off with the (apparently married) scoundrel. Surprisingly, the jury cannot reach a unanimous verdict to acquit. The one holdout is a poor farmer, Stonewall Jackson Fentry, whose reluctance to join the majority is witnessed by Chick. On Stevens's order, Chick had climbed a tree to get within earshot of the jury room (this is yet another indication of Stevens's failure to serve as an ethical and effective lawyer). After some investigation, Stevens learns that Fentry had cared for Buck's mother during the last few weeks of her pregnancy and the childbirth that killed her, and that Fentry had then begun the task of raising her baby (named Jackson and Longstreet Fentry). That baby, who was taken from Fentry forcefully a few years later by the mother's kin, grew up to become the lowlife known as Buck Thorpe.

The screenplay for the filmed version of "Tomorrow" was written by Horton Foote, the Pulitzer-prize-winning playwright

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[64] BLOTNER, *supra* note 1, at 422. *See also* William Faulkner & Floyd Davis, *Tomorrow [a Story]*, SATURDAY EVENING POST, Nov. 23, 1940, at 22.

[65] WILLIAM FAULKNER, KNIGHT'S GAMBIT (Vintage Books 1978) (1949).

[66] BLOTNER, *supra* note 1, at 504-05.

[67] WILLIAM FAULKNER, *Tomorrow*, *in* KNIGHT'S GAMBIT 85, 85 (Vintage Books 1978) (1949).

[68] *Id.* at 86.

("The Young Man from Atlanta" (1995)) who has also received two Academy Awards—"To Kill a Mockingbird" (1962), for best adapted screenplay, and "Tender Mercies" (1983), for best original screenplay—and one Emmy ("Old Man" (1997), based on the "Old Man" sections of Faulkner's *If I Forget Thee, Jerusalem*).[69] "Tomorrow," a small, independent film shot in Mississippi, reunited Foote with Robert Duvall, the actor who had made his screen debut as Boo Radley in "To Kill a Mockingbird," and whose blockbuster film, "The Godfather," also premiered in 1972.[70] The actor and screenwriter would again collaborate in "Tender Mercies," for which Duvall would carry home the Best Actor Oscar.[71]

Duvall prepared for the role of Jackson Fentry by performing in Foote's stage version of the play in 1968 (Foote's teleplay was also broadcast on Playhouse 90 in 1960, starring Richard Boone).[72] The actor noted, "Since I was 10, I've known guys like Jackson Fentry, these kind of stoic, Appalachian guys. If Fentry is putting a stick of wood on the fire, or if he's dying, he's the same."[73] Duvall's Fentry speaks in short, deliberate sentences, suggestive of Billy Bob Thornton's portrayal of Karl Childers in "Sling Blade" (1996), the film in which Duvall played Karl's father.[74]

Duvall's co-star in the film is Olga Bellin, a stage and television actress appearing in her only major film role.[75] Bellin's Sarah is a pitiful, abandoned, but perfectly proper, southern woman whose extended soliloquies contrast sharply with Fentry's crisp, grunt-like utterances. The director, Joseph

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[69] *See* Carol Strickland, *After 60 Plays, Horton Foote Still Striving*, CHRISTIAN SCIENCE MONITOR, Sept. 21, 2007, at 11.

[70] *See* Nan Robertson, *Robert Duvall: The Actor As Chameleon*, N.Y. TIMES, Jan. 29, 1989, at A1.

[71] *Id.*

[72] *See* John P. Shanley, *Kim Stanley and Richard Boone Star in Foote's Adaptation of 'Tomorrow,'* N.Y. TIMES, Mar. 8, 1960, at 67 (film review).

[73] *See* Chris Chase, *Quick—What's This Man's Name?*, N.Y. TIMES, Apr. 23, 1972, at D11.

[74] *See* Janet Maslin, *Rejoining a World Left Behind*, N.Y. TIMES, Sept. 30, 1996, at C15 (film review of "Sling Blade").

[75] *See Olga Bellin; Actress, 54*, N.Y. TIMES, Nov. 12, 1987, at D31 (obituary).

Anthony, was a curious choice. "Tomorrow" was the last of the seven films that he directed, capping a career that began with "The Rainmaker" (1956) and "The Matchmaker" (1958).[76] In between, Anthony found success as a Broadway director, staging four hits at the same time in the early 1960s.[77] The major obstacle that Anthony faced was the grinding pace of the middle portion of Foote's screenplay, the long flashback between the trial and the solution to the mystery of Buck Thorpe. While the opening and closing sequences follow the story, the meat of the film—the caring relationship between Jackson and Sarah—is the product of Foote's imagination much more than Faulkner's.

Despite the liberties taken by the author of the screenplay, the legal themes of the film, revolving around the trial and the mystery, are pure Faulkner. The writer challenges a basic precept of the Anglo-American criminal justice system: that jurors must be objective and uninfluenced by personal knowledge of the case before them.[78] Bookwright's trial was intended to be a formality (by the prosecution and the defense). The entire community should have appreciated the fact that Buck Thorpe was a menace to society, and that a father had the right to use deadly force to protect his daughter from Thorpe's clutches. Consider Stevens's closing argument for the defense:

> Now I know there's not a man on this jury or a man in Mississippi that in his heart can find my client, Bookwright, guilty for defending his daughter against a rascal like Buck Thorpe. And that's what I'm talking about. Not about the dead

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[76] *See* Bruce Lambert, *Joseph Anthony, 80, a Director and Stage and Film Actor, Dies*, N.Y. TIMES, Jan. 22, 1993, at A17.

[77] *Id. See also Joseph Anthony; Had 4 Successes on Broadway at the Same Time*, L.A. TIMES, Jan. 23, 1993, at A22.

[78] *See, e.g.*, Gentile v. State Bar of Nev., 501 U.S. 1030, 1055 (1991) (Kennedy, J., plurality opinion) ("*Voir dire* can play an important role in reminding jurors to set aside out-of-court information and to decide the case upon the evidence presented at trial."); Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (White, J., plurality opinion) ("*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.").

> man, character, or the morality of the act he was engaged in, not about self-defense, whether or not the defendant was justified to the point of taking life, but about all of us who are not dead—human beings who at the bottom just want to do right. Human beings with all the complexities of human passion, instincts, beliefs.[79]

If a competent *voir dire* had been conducted, Jackson would have been taken out of the jury pool, given his close relationship with Thorpe as a child. Yet, it is *because* of that relationship, because of Fentry's knowledge of Thorpe's essential humanity, that Bookwright's crime is given Fentry's (and then Stevens's) serious consideration. Faulkner is telling us that justice would not have been present in that courtroom without Fentry—the technically unqualified juror—on the panel.

The second lesson William Faulkner the legal commentator imparts in "Tomorrow" is that our existing legal system often ignores the uncontrollable factors that lead to a life of lawlessness. Buck Thorpe came into the world enveloped by the love and devotion of Jackson Fentry. Foote captures these emotions skillfully, showing us Fentry's care and affection for the baby as he grows into a small boy. Yet, in a painful scene, the child is snatched away from this protective shell by the brutish men in Sarah's family. Fentry, the lowest white man on Mississippi's socioeconomic ladder, can appreciate better than the sophisticated and educated Gavin Stevens the effect that nurture (or the lack thereof) can have on human behavior. Anthony captures that knowledge when, during the return to Stevens's closing argument after the long flashback sequence, we see Fentry remembering the child, while the defense attorney paints a vivid picture of Buck as an evil adult. When the full story of Buck Thorpe is revealed to us, we begin to question the legal proceedings that should have been designed to vindicate and respect Thorpe's existence.

The last lines of the film, in which Foote combines Stevens's observations with those of another character in the story, invoke

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[79] TOMORROW (Filmgroup Productions 1972) [hereinafter TOMORROW, FILMGROUP].

Shakespeare[80] to capture the essential humanity of the simplest person, as he or she endures the indignities of a harsh physical existence and the injustice of an imperfect system of legal redress:

> I would never have guessed Fentry's capacity for love. I suppose I'd figured that coming from where he came from, that even the comprehension of love had been lost out of him, back down the generations when the first Fentry had to take his final choice between the pursuit of love and the pursuit of keeping on breathing. The lowly and invincible of the earth—to endure and endure and then endure, tomorrow and tomorrow and tomorrow.[81]

Once again, as in "Intruder in the Dust," the film version of Gavin Stevens reconsiders the assumptions that he jumped to upon his initial consideration of the crime.

Like Brown and Maddow's "Intruder in the Dust," the Anthony-Foote version of "Tomorrow" captures much of the drama and atmosphere of the Faulkner work. In both films, the viewer is challenged to consider the nature of justice in our formal legal system, the personhood of those at the margins of society, and the fine line between law and lawlessness. In these ways and others, the filmmakers have provided an intriguing introduction to William Faulkner as an American legal commentator who deserves our more serious consideration.

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[80] "To-morrow, and to-morrow, and to-morrow, Creeps in this petty pace from day to day, To the last syllable of recorded time . . . . " WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5.

[81] TOMORROW, FILMGROUP, *supra* note 79.

SELECTED ISSUES AND TRENDS IN CIVIL LITIGATION IN MISSISSIPPI FEDERAL DISTRICT COURTS

*Robert M. Weems**

I. INTRODUCTION AND OVERVIEW OF MISSISSIPPI DISTRICT COURT LITIGATION

This article reviews and analyzes selected issues and trends in Mississippi district court litigation, written from the perspective of a career federal district law clerk. For the purpose of this article, the term district court "litigation" should be understood to mean dispositive motion practice, such as motions to remand, motions for summary judgment and motions to compel arbitration. Much of what attorneys understand as "litigation," including virtually all discovery matters, is dealt with by magistrate, rather than district, judges (subject to the district judge's appellate review). This article does not address such non-dispositive motions, nor does it address issues relating to federal trial practice, which may vary considerably depending

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upon the trial preferences of a particular district judge.

The issues addressed in this article have been selected based primarily upon their practical importance in Mississippi district court litigation, with particular attention given to areas of the law where the governing legal standards are evolving. The first of these trends, discussed in section II, involves the increasingly difficult standards confronted by defendants who seek to remove civil cases to federal court. With certain notable exceptions, recent years have seen a tightening of applicable removal standards in the Fifth Circuit. The article discusses the policy implications of this trend and analyzes its impact upon Mississippi civil litigation. Section III of the article discusses the difficult summary judgment standards which confront Mississippi plaintiffs seeking recovery under either of the twin pillars of Mississippi district court litigation: employment discrimination cases under Title VII and constitutional claims under 42 U.S.C. § 1983. Particular attention is given to recent U.S. Supreme Court and Fifth Circuit decisions which have significantly altered summary judgment standards in employment discrimination cases. Finally, section IV discusses the increasing prevalence of arbitration actions brought in federal courts and the impact of this phenomenon upon Mississippi civil practice as a whole.

A. Mississippi District Judges

Prior to discussing the trends affecting district court litigation in Mississippi, the district judges whose decisions actually make up those trends should be noted. As of the writing of this article, there are five active and six senior district judges in the Southern District, while the Northern District is staffed with three active and two senior district judges, as follows:

Southern District

Active District Judges:	*Senior District Judges*:
Chief: Henry T. Wingate, Jackson	William H. Barbour, Jr., Jackson
Louis Guirola, Jr., Gulfport	David Bramlette, III, Natchez

Daniel P. Jordan, Jackson
Keith Starrett, Hattiesburg
Sul Ozerden, Gulfport
Walter J. Gex, III, Gulfport
Tom S. Lee, Jackson
Dan M. Russell, Jr., Jackson
L.T. Senter, Jr., Gulfport

Northern District

Active District Judges:
Chief: Michael P. Mills, Oxford
W. Allen Pepper, Greenville
Sharion Aycock, Aberdeen

Senior District Judges:
Neal B. Biggers, Oxford
Glen H. Davidson, Aberdeen

It should be noted that the number of district judges in the Southern District has increased significantly in recent years. Indeed, Judge Lee has recently joined Judges Barbour, Bramlette and Gex in taking senior status, and once the U.S. Senate confirms Judge Lee's replacement, the Southern District will have a full complement of active judges, along with a considerably increased number of senior judges. This would appear to be fortuitous timing, considering the demands placed upon the Southern District by the Hurricane Katrina litigation.

B. District Court Caseloads and Case Assignment Procedures

The larger number of district judges in the Southern District corresponds to a considerably larger civil case load in that district. Statistics reported by the Administrative Office of the U.S. Courts reveal that, during the five annual reporting periods ending in September 30, 2006, the Southern District of Mississippi averaged 3,830 civil lawsuits filed each year, while the Northern District averaged 1,390 civil lawsuits filed each year.[1] During the twelve-month period preceding September 30, 2006, the Southern District saw a total of sixty-three civil trials, with a median time interval from filing to verdict of 25.5

[1] U.S. Courts, Judicial Facts and Figures tbl.4.2, *available at* http://www.uscourts.gov/judicialfactsfigures/2006/Table402.pdf (on file with the author) [hereinafter 2006 Facts and Figures]; ADMIN. OFFICE OF THE U.S. COURTS, 2006 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.C (2006), *available at* http://www.uscourts.gov/judbus2006/appendices/c0.pdf (on file with the author) [hereinafter 2006 Annual Report].

months.[2] During that same time period, the Northern District saw a total of thirty-seven civil trials, with a median time interval from filing to verdict of twenty-four months.[3] It is thus apparent that, regardless of the district involved, only a small percentage of civil lawsuits filed in Mississippi district courts actually proceed to trial.

The assignment of cases to judges within a district is a matter within the discretion of the district court. In the Northern District, a December 3, 2007, order signed by Chief Judge Mills provides for the allocation of civil cases among the Northern District judges as follows:[4]

	EASTERN	*DELTA*	*WESTERN*	*GREENVILLE*
Chief Judge Mills	20%	30%	50%	25%
Judge Pepper	5%	50%	15%	50%
Judge Aycock	50%	10%	15%	25%
Sr. Judge Biggers	10%	10%	10%	0%
Sr. Judge Davidson	15%	0%	10%	0%

Judge Mills's order notes that, based upon the volume of cases filed in each division, this draw results in an allocation of 28.6% of the civil cases to each active district judge and an allocation of 7.1% of cases to each of the two senior judges.[5] It should be noted that, in allocating cases, the 2007 order grants significant weight to the geographical proximity of the district judges to the division in which the cases were filed. Nevertheless, the fact remains that a plaintiff who files a lawsuit in Greenville may nevertheless end up having his case tried before Judge Aycock in Aberdeen or Judge Mills in Oxford. At the same time, a litigant who desires to have his case tried in a particular division will maximize his chances of doing so by filing suit in that division. There is nothing to prevent a district judge from hearing a trial in a location other than his home

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[2] 2006 Annual Report *supra* note 1, at tbl.C-10.

[3] *Id.*

[4] *In Re*: Procedures for the Assignment of Civil Cases, No: 3:98MC19 (Dec. 3, 2007) [hereinafter Mills' Standing Order].

[5] *Id.*

court, but this is not frequently done, at least in the author's experience in the Northern District.

A recent standing order allocating cases in the Southern District adopted a somewhat different approach, with certain judges being assigned all of the civil cases filed in their home divisions.[6] In a November 29, 2006, order, Chief Judge Wingate allocated civil cases in the Hattiesburg and Western divisions of the Southern District as follows:[7]

	HATTIESBURG	*WESTERN*	*SOUTHERN*
Judge Starrett	100%	*	*
Judge Bramlette	*	100%	*

Judge Wingate's order did provide for a division of the cases in the Jackson and Eastern divisions among the district judges residing in Jackson, as follows:[8]

	JACKSON	*EASTERN*
Chief Judge Wingate	33%	33%
Judge Jordan	33%	34%
Judge Lee	26%	33%
Sr. Judge Barbour	8%	*

It should be noted that, at the time of Judge Wingate's November 2006, order, Judges Bramlette and Lee had announced their intention to take senior status, but their replacements had not yet been confirmed by the U.S. Senate. On August 23, 2007, following Judge Ozerden's swearing in, Judge Wingate issued an "administrative order" allocating the Southern Division civil filings as follows:[9]

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[6] Administrative Order Assiging Civil Cases (S.D. Miss. Aug. 23, 2007) (on file with the author) [hereinafter Wingate's Standing Order]. Judge Wingate's allocation orders are public orders available from the clerk's office, but they have apparently not been assigned a case number. The author is grateful to the Southern District's Chief Deputy Clerk Sandra McCormack for providing him with a copy of these orders.

[7] *Id.*

[8] *Id.*

[9] *Id.*

	SOUTHERN
Judge Guirola	50%
Judge Ozerden	50%

Parties will occasionally seek to obtain a transfer of a case from one district judge to another or from one trial location to another, within the Southern or Northern districts. While the federal venue and transfer statutes provide relatively clear guidelines regarding which federal district(s) might properly hear a case,[10] the issue of proper trial venue within a district lies largely within the discretion of the district court. The Fifth Circuit has held that "[a]n intradistrict transfer is not required absent a strong showing of prejudice."[11] In the Northern District, requests for intradistrict transfer often involve civil plaintiffs seeking for a trial to be held in Greenville, rather than Oxford, due to perceptions regarding the nature of juries at these locations. However, both Judge Pepper and Judge Mills have rejected requests for intradistrict transfer based upon such generalized factors as the demographics of potential jurors, and it is only in extraordinary cases that a party will be able to make the "strong showing of prejudice" required to obtain intradistrict transfer. [12]

II. CURRENT TRENDS IN REMOVAL LITIGATION

A. Increased Restrictions on Removals Based on Fraudulent Joinder

Recent years have seen a significant reduction in the number of cases which have been removed to federal court in Mississippi. This phenomenon appears to result from at least

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[10] *See* 28 U.S.C. §§ 1391, 1404 & 1406 (2000).

[11] United States v. Duncan, 919 F.2d 981, 985 (5th Cir.1990) (citing United States v. Dickie, 775 F.2d 607, 609 (5th Cir. 1985)).

[12] *See, e.g.,* Haggie v. Coldwell Banker Real Estate Corp., No. 4:04CV111, 2007 WL 43838 (N.D. Miss. July 19, 2007); United States v. Patton, No. 4:05CR95, 2006 WL 2038628 (N.D. Miss. July 19, 2006).

two primary—and independent—factors. First, in light of tort reform enactments by the Mississippi Legislature and a more conservative makeup to the Mississippi Supreme Court, defendants do not appear to regard the prospect of litigating in state court with the same level of dread with which they once did. Second, and perhaps more importantly, the Fifth Circuit's September 2004 en banc decision in *Smallwood v. Illinois Central Railroad Company* has made it considerably more difficult for defendants to remove cases to federal court on the basis of fraudulent joinder (or "improper" joinder as the Fifth Circuit chose to refer to it in *Smallwood*).[13]

A review of the number of removals and remands in the Northern District in recent years illustrates the impact of the *Smallwood* decision.[14]

Cases Removed:
2004 – 355
2005 – 235
2006 – 248

Cases Remanded:
2004 – 14
2005 – 54
2006 – 37

It is thus apparent that, in the years following the *Smallwood* decision, the number of removals in the Northern District has significantly declined, while the number of remand orders has significantly increased. The 2004 and 2005 figures on cases remanded are likely skewed downward and upward, respectively, by the fact that many district judges had stayed rulings on remand motions pending the Fifth Circuit's decision in *Smallwood*. Accordingly, a number of cases which might still have been remanded in 2004 (even absent *Smallwood*) were

[13] Smallwood v. Illinois Cent. Railroad Co., 385 F.3d 568 (5th Cir. 2004).

[14] The author is grateful to the Northern District's Chief Deputy Clerk for Operations, Gina Kilgore, for researching, and providing him with, these statistics.

remanded in 2005 instead. Nevertheless, the overall number of cases removed provides a good indication of *Smallwood*'s impact, and these figures confirm that defendants are removing considerably fewer cases following that decision.

The impact of the *Smallwood* decision is not surprising, considering that the fraudulent joinder doctrine has traditionally been the primary basis for removing cases to federal court in Mississippi.[15] In removing a case based upon fraudulent joinder, a defendant argues that no reasonable possibility of recovery exists against any non-diverse defendants and that such defendants should therefore be dismissed from the action based upon a finding of fraudulent joinder. Any such dismissal of non-diverse defendants by a federal court leaves it with purely diverse parties so as to support diversity jurisdiction.[16]

The typical fraudulent joinder removal involves a complaint filed by a Mississippi plaintiff against a nonresident corporation, which complaint also names one or more Mississippi resident agents/employees of that corporation as defendants. Prior to *Smallwood*, defendants would frequently remove certain kinds of cases (particularly insurance and consumer fraud cases) to federal court and thereupon seek dismissal of any such non-diverse defendants based upon fraudulent joinder. Assuming that the plaintiff filed a motion to remand, a period of remand-related discovery would typically ensue, during which the parties would seek to either prove or disprove the viability of the claims against the non-diverse defendants. Following briefing by the parties, the district judge would then decide whether a "reasonable possibility of recovery" existed against any non-diverse defendants, and, thus, whether these defendants should be dismissed with prejudice upon a finding of fraudulent joinder.

Prior to *Smallwood*, there was a notable difference in the handling of fraudulent joinder removals by district judges in this state. Many district judges, perhaps a majority, seemed to have

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[15] Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42 (5th Cir. 1992) (citing B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. 1981)).

[16] *Id.*

a more restrictive view of diversity jurisdiction and appeared more willing to grant plaintiffs the benefit of the doubt that they had a "reasonable possibility of recovery" against any non-resident defendants. These judges were thus more likely to give considerable deference to the allegations of the complaint and were more likely to remand the case to state court. By contrast, other district judges were more likely to scrutinize the record and weigh the facts produced by remand-related discovery in deciding whether a reasonable possibility of recovery existed against any non-diverse defendants. This approach generally resulted in these district judges retaining jurisdiction over more cases than their counterparts who showed greater deference to the plaintiff's complaint.

In the author's experience, the district judges who were somewhat more likely to engage in a quasi-summary judgment analysis tended to be located in divisions, such as the Jackson Division of the Southern Division, which frequently saw removals of large numbers of the sort of questionable lawsuits which, prior to tort reform, prevailed in parts of this state. It can certainly be argued that these district judges played a positive role in this state's jurisprudence by doing so, since they often provided a check on some of the worst excesses of pre-tort reform litigation in Mississippi. At the same time, it is not surprising that the district judges located in divisions which saw fewer such questionable lawsuits tended to be more likely to defer to the allegations of the plaintiff's complaint. As it turned out, some of the worst inequities of the mass tort litigation system were curtailed by tort reform enactments around the same time as the *Smallwood* appeal was working its way through the Fifth Circuit. It is thus unclear what effect these tort reform enactments would have had on the remand practices of Mississippi district judges, had *Smallwood* been decided differently.

At any rate, on September 10, 2004, the en banc Fifth Circuit in *Smallwood* endorsed a more restrictive view of fraudulent joinder by both limiting the potential arguments which could be raised by removing defendants and by making fundamental observations regarding the proper scope of a

district judge's inquiry in fraudulent joinder removals. Interestingly, it was former Mississippi district judge Charles W. Pickering, during his brief tenure as a recess appointee to the Fifth Circuit, who proved to be the "swing" vote in the eight-to-seven *Smallwood* decision. It may be inferred that Judge Pickering's views on the fraudulent joinder issue were heavily informed by his experiences as a Mississippi district judge.

It is also noteworthy that the portion of the *Smallwood* opinion which is arguably the most important appears to constitute dicta. It had been anticipated that the en banc Fifth Circuit in *Smallwood* would provide clarification regarding the application of the so-called "common defense" rule in fraudulent joinder cases, discussed *infra*, and this proved to be the case. However, in a surprise to many attorneys, the Fifth Circuit took the opportunity of an en banc decision to make fundamental observations regarding the proper scope of the fraudulent joinder inquiry. The Fifth Circuit chose to endorse a more restrictive view of fraudulent joinder, writing as follows:

> There has also been some uncertainty over the proper means for predicting whether a plaintiff has a reasonable basis of recovery under state law. A court may resolve the issue in one of two ways. The court may conduct a Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether the complaint states a claim under state law against the in-state defendant. Ordinarily, if a plaintiff can survive a Rule 12(b)(6) challenge, there is no improper joinder. That said, there are cases, hopefully few in number, in which a plaintiff has stated a claim, but has misstated or omitted discrete facts that would determine the propriety of joinder. In such cases, the district court may, in its discretion, pierce the pleadings and conduct a summary inquiry.[17]

The *Smallwood* majority thus stated that, in most cases, district courts should analyze fraudulent/improper joinder removals under a "12(b)(6)-type" standard, which is, clearly, highly deferential to the allegations of the complaint and leaves little, if any, room for the weighing of affidavits or other such

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[17] *Smallwood*, 385 F.3d at 573.

extrinsic evidence.[18] Lest there be any confusion in this regard, the Fifth Circuit further observed that it is only in "hopefully few" cases, in which the plaintiff has "misstated or omitted discrete facts," that a "summary inquiry" based upon extrinsic evidence should even be conducted.[19]

In a vigorous dissent joined by six other judges, Judge Jolly objected to the majority's decision to even address the basic standard applicable in fraudulent joinder removals, since that had not heretofore been an issue in the case.[20] Specifically, Judge Jolly wrote as follows:

> Of more importance, the majority, with no call to do so, addresses procedure and discovery issues that arise in remand proceedings. This writing is fairly unremarkable except that it appears to be written to underscore one side of our precedent. It certainly has no precedential effect. These remarks are pure dicta because no one has made an issue of this subject at any point in these proceedings.[21]

While Judge Jolly may well be correct that the aforementioned language in *Smallwood* was dicta within the context of that case, he also correctly noted that the dicta served to endorse a more restrictive line of Fifth Circuit decisions on the subject of fraudulent joinder.[22] Clearly, the holdings in this more restrictive line of cases are not dicta, and their endorsement by an en banc majority of the Fifth Circuit cannot fail to have considerable effect at the district court level. It should also be noted that the split among Fifth Circuit judges in *Smallwood* closely tracks the comparable pre-*Smallwood* split among Mississippi district judges regarding the proper scope of the fraudulent joinder doctrine. It is thus apparent that the issues raised in *Smallwood* are very close ones about which

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[18] *Id.*

[19] *Id.*

[20] *Smallwood*, 385 F.3d at 583-84 n.10. (Jolly, J., dissenting).

[21] *Id.*

[22] In *McKee v. Kansas City S. Ry. Co.*, 358 F.3d 329, 336 (5th Cir. 2004), for example, a Fifth Circuit panel reversed a district court's finding of fraudulent joinder, cautioning that "[t]he district court was not to conduct a mini-trial of [plaintiff's] claims."

reasonable judges can disagree.

While the aforementioned dicta is arguably the most significant aspect of the *Smallwood* decision, the actual holding of the case restricted the fraudulent joinder doctrine in an additional, and quite important, way.[23] Citing the 1914 U.S. Supreme Court decision of *Chesapeake & Ohio Railway Company. v. Cockrell*, the Fifth Circuit held that:

> [W]hen a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant. In such a situation, the entire suit must be remanded to state court.[24]

The Fifth Circuit thus adopted the so-called "common defense" rule pursuant to which a district court may not consider defenses, such as statute of limitations defenses, which would "equally dispose of all defendants" if applied in the fraudulent joinder context.[25] The Fifth Circuit reasoned that such cases do not involve fraudulent joinder, but, rather, merely a lawsuit without merit.[26] Specifically, the Fifth Circuit held as follows:

> [W]hen, on a motion to remand, a showing that compels a holding that there is no reasonable basis for predicting that state law would allow the plaintiff to recover against the in-state defendant necessarily compels the same result for the nonresident defendant, there is no improper joinder; there is only a lawsuit lacking in merit.[27]

While the *Smallwood* majority's admonition that a "12(b)(6)-type" standard should be applied in most fraudulent joinder cases may be the most significant part of the decision, the Fifth Circuit's adoption of the "common defense" rule makes

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[23] *Smallwood*, 385 F.3d at 568.

[24] *Id.* at 571.

[25] *Id.* at 574.

[26] *Id.*

[27] *Id.*

proving fraudulent joinder that much more difficult for defendants by limiting the defenses which they are able to raise in the fraudulent joinder context.

Whether the limiting of the fraudulent joinder doctrine in *Smallwood* is a net positive for this state's jurisprudence depends upon the reader's perspective. Without question, *Smallwood* will serve to significantly limit the circumstances in which Mississippi district courts might retain jurisdiction over cases removed on the basis of diversity jurisdiction, and defendants will no doubt argue that this results in their being deprived of their right to invoke federal jurisdiction.

At the same time, *Smallwood* is quite arguably consistent with the rather restrictive view of diversity jurisdiction which has historically been recognized by the U.S. Supreme Court. For example, the Supreme Court has stated that "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the [federal diversity] statute has defined."[28] Also, the *Cockrell* decision upon which the Fifth Circuit based its adoption of the "common defense" rule arguably supports a more limited interpretation of removal jurisdiction in a general sense.[29] To the extent that such policy considerations are relevant, it is also true that *Smallwood* coincided with the enactment of significant tort reform in Mississippi, and this reform served to remove many of the abusive practices which made Mississippi district courts seem a comparative oasis of fairness for many defendants, particularly those forced to defend themselves in certain notorious venues such as Jefferson and Claiborne counties.

Although the policy issues surrounding *Smallwood* are open to debate, it seems likely that the decision will serve to reduce many of the delays which have heretofore been part and parcel of the fraudulent joinder removal process. In removed cases where a motion to remand is filed, the resolution of fraudulent joinder issues has often resulted in a delay of up to a

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[28] Healy v. Ratta, 292 U.S. 263, 270 (1934).

[29] Chesapeake & O.R. Co. v. Cockrell, 232 U.S. 146 (1914).

year while the parties conduct remand-related discovery, brief the remand motion, and await a ruling from the district court. In cases where the district court grants a motion to remand, the detour into federal court has tended to produce very little to advance the litigation as a whole, since remand-related discovery is generally limited to issues relevant to the non-diverse defendants. Moreover, even in cases where a district court denies a motion to remand, this by no means serves to finally resolve any jurisdictional uncertainties, since the Fifth Circuit can always disagree that federal jurisdiction is present, even after a case has been tried to a jury verdict in district court.

Any district judge who is considering retaining jurisdiction over a case must be cognizant of the sharp divisions among the Fifth Circuit judges on the proper scope of the fraudulent joinder doctrine, which division was so clearly revealed in *Smallwood*.[30] Simply stated, a district judge will have no way of knowing whether a majority of the three-judge Fifth Circuit panel which reviews his or her denial of any remand motion will consist of judges who agree with the majority or the dissenting views expressed in *Smallwood*. As noted previously, the *Smallwood* dissenting judges regard the majority's observations regarding the proper scope of the fraudulent joinder doctrine as pure dicta entitled to no weight in future cases.[31] It seems clear, however, that the majority in *Smallwood* expressed their views very carefully and that these judges favor a substantially more limited application of the fraudulent joinder doctrine than the dissenting judges.[32] As such, it seems reasonable to conclude that a Fifth Circuit panel consisting of two or more judges from the *Smallwood* majority will closely scrutinize any district court denial of a motion to remand based upon the standards set forth in *Smallwood*.

Given the very harsh consequences of being reversed on a denial of a remand motion—which may include the vacating of years of hard work and expense litigating the case in federal

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[30] *Smallwood*, 385 F.3d at 568.

[31] *See supra* note 21 and accompanying text.

[32] *Smallwood*, 385 F.3d at 568.

court—the temptation for many district judges will be very strong to err on the side of remanding the cases. At the same time, the effect of the *Smallwood* decision should not be overstated. As noted previously, 248 civil cases were removed to the Northern District in 2006, and only thirty-seven cases were remanded.[33] While these figures represent a decrease in the number of removals and an increase in the number of remands as compared to 2004, it should be apparent that federal courts remain very much open to removals, even after *Smallwood*.

It should also be noted that the reduction in the number of fraudulent joinder removals following *Smallwood* has served to bring removal practices in the Fifth Circuit into greater alignment with removal practices in other circuits and also with historical trends in this circuit. This fact is illustrated by a survey of published district court fraudulent joinder opinions conducted by University of Mississippi Law Professor E. Farish Percy. In a 2005 law review article, Professor Percy wrote that a Westlaw search revealed the following numbers of reported district court opinions mentioning "fraudulent joinder," divided by circuit:[34]

Circuit:	*1990-1994*	*1995-1999*	*2000-2004*	*Total*
1st	1	15	9	15
2nd	3	13	31	47
3rd	12	20	62	94
4th	7	21	41	69
5th	164	280	474	918
6th	17	18	31	66
7th	16	26	32	74
8th	6	11	26	43
9th	10	26	58	94
10th	5	4	15	24
11th	11	56	46	113

[33] *See supra* note 14 and accompanying text.

[34] E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 240 tbl. 1 (2005).

These figures demonstrate that, for whatever reason, fraudulent joinder removals have historically played a far greater role in Fifth Circuit litigation than in other circuits, and this trend had accelerated in the years preceding the *Smallwood* opinion. In the writer's view, the figures suggest that, rather than unduly restricting a defendant's right to remove cases to federal court, the Fifth Circuit's opinion in *Smallwood* actually constitutes a beneficial correction to the unduly liberal fraudulent joinder removal practices which had prevailed in this circuit in recent years.[35] At any rate, it is clear that *Smallwood* has served to fundamentally alter the nature of the fraudulent joinder removal process in Mississippi, and litigants should be aware of this fact.

B. Evolving Amount in Controversy Issues in Removals Based on Diversity of Citizenship

Mississippi district courts are frequently called upon to determine whether the $75,000 amount in controversy requirement is met in cases removed to federal court on the basis of diversity jurisdiction. The term "amount in controversy remands" refers to motions to remand filed by plaintiffs in which they argue that the $75,000 jurisdictional threshold is not met. As such, amount in controversy remands represent one of the few contexts in the law in which plaintiffs attempt to convince a court how *little* their lawsuit is worth. While the Fifth Circuit has established standards for analyzing amount in controversy remands, these standards are sufficiently vague as to leave room for each Mississippi district court to establish its own individualized practices for determining whether the standards are met. Some of these individualized practices will be discussed *infra*, but a general discussion of Fifth Circuit standards in this context is first required.

The Fifth Circuit has held that, in cases where diversity of citizenship exists among the parties, removal is proper if it is "facially apparent" from the complaint that the amount in

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[35] *Id.* at 231-39

controversy is met.[36] Where the plaintiff has pled a specific amount that exceeds $75,000, in order for a court to refuse jurisdiction it must appear to "a legal certainty that the claim is really for less than the jurisdictional amount."[37] Thus, if a plaintiff's complaint seeks, say, $100,000 in damages, then it is almost always "facially apparent" that the amount in controversy is met and the defendant may remove the case, assuming that diversity exists.[38] The typical amount in controversy remand does not involve a clear request for a specific amount of damages in excess of the jurisdictional amount, however. Generally speaking, removals where the amount in controversy is at issue involve requests for an indeterminate amount of damages, or in some cases, an amount less than $75,000.

It should be noted that the 1995 decision of *Allen v. R & H Oil & Gas Company* provides Mississippi defendants with a particularly strong basis for meeting the "facially apparent" test in cases where multiple plaintiffs seek punitive damages.[39] The Fifth Circuit held in *Allen* that, under Mississippi law, the full amount of alleged punitive damages must be counted against each plaintiff to determine the amount in controversy because punitive damages, under Mississippi law, are fundamentally collective.[40] Thus, in a case involving ten plaintiffs who each seek an indeterminate amount of punitive damages under Mississippi law, *Allen* provides that the full amount of punitive damages recoverable by *all* plaintiffs must be counted against *each* plaintiff for determining whether the amount in controversy is met. In such cases, it will generally be "facially apparent" from the complaint that the amount in controversy is met, regardless of the specific amounts sought in the complaint.

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[36] Beichler v. Citigroup, Inc., 241 F. Supp. 2d 696, 699 (S.D. Miss. 2003) (discussing standards articulated by Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995)).

[37] Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995) (quoting St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938)).

[38] *Id.* at 1335 (citing *St. Paul Mercury Indem. Co*, 303 U.S. at 289).

[39] *Id.* at 1326.

[40] *Id.* at 1333-34.

If it is, in fact, "facially apparent" that the amount in controversy requirement is met in a particular case, then "post-removal affidavits, stipulations, and amendments" will not deprive the district court of jurisdiction.[41] In cases where it is not "facially apparent" that the amount in controversy is met, the Fifth Circuit has established a framework for determining whether jurisdiction exists. This framework gives defendants the initial burden of showing, either through the complaint or through extrinsic facts, that the amount in controversy is most likely met, but which permits plaintiffs to rebut that showing by demonstrating to a "legal certainty" that the amount in controversy requirement is not, in fact, met.[42]

Clearly, these are fairly nebulous standards, thus leaving it to Mississippi district courts to determine exactly what sort of proof will suffice to meet them. As a result, one district judge's conclusions regarding the level of proof required in amount in controversy remands might differ significantly from those of another district judge. In seeking to meet their initial burden, defendants very frequently submit evidence from the record, such as medical bills, interrogatory responses and deposition testimony from the plaintiff (such as testimony regarding emotional distress) to argue that the amount in controversy is met.[43] Other defendants may seek to analyze the recovery sought in the complaint in conjunction with examples of similar Mississippi lawsuits which resulted in verdicts in excess of $75,000.[44] It is up to each district judge to decide whether such

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[41] Gebbia v. Wal-Mart Stores, Inc., 233 F.3d 880, 883 (5th Cir. 2000) (citing *St Paul Mercury Indem. Co.*, 303 U.S. at 292). *See also* Thompson v. S. Nat'l Fin. Corp., No. 3:06CV75WHBJCS, 2006 WL 980783, at *3 (S.D. Miss. Apr. 12, 2006) (rejecting plaintiff's offer to submit an affidavit limiting his recovery since jurisdiction had already attached).

[42] *Allen*, 63 F.3d at 1335 (5th Cir. 1995) (citing Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia v. Dow Quimica de Colombia S.A., 988 F.2d 559, 566 (5th Cir. 1993); Garza v. Bettcher Indus., Inc., 752 F. Supp. 753, 763 (E.D. Mich. 1990)).

[43] *See, e.g.*, Holmes v. Citifinancial Mortgage Co., 436 F. Supp. 2d 829, 832 (N.D. Miss. 2006).

[44] *See, e.g.*, Easterling v. Smithkline Beecham Corp., No. 2:05CV35KS-JMR, 2006 WL 1581322 at *1 (S.D. Miss. June 2, 2006); Irons v. Glaxo Welcome, Inc., No. 3:04CV310LN, 2006 WL 1272797 at *2 (S.D. Miss. May 9, 2006).

proof suffices to show that the amount in controversy requirement is likely met, and defendants' difficulty in meeting this burden obviously varies depending upon the facts of a particular case.

In cases where defendants carry their initial burden of showing that the amount in controversy is likely met, Mississippi plaintiffs have very frequently sought to meet the "legal certainty" test by submitting affidavits in which they affirm that they will not seek in excess of a specific amount. Indeed, the submission of the plaintiff's affidavit has become for many district judges an expected part of any amount in controversy remand and is frequently the basis upon which the motion either succeeds or fails.[45]

It should be noted that the Fifth Circuit cautioned in at least one decision that it was not establishing a "burden-shifting framework" and that plaintiffs "who want to prevent removal must file a binding stipulation or affidavit *with their complaints*."[46] This statement notwithstanding, Mississippi district judges have very frequently permitted plaintiffs to submit *post-petition* affidavits establishing to a "legal certainty" that the amount in controversy requirement is not met.[47] This does not appear to be the result of a conscious rebellion by Mississippi district judges against the dictates of the Fifth Circuit, but, rather, a recognition of the practical reality that very few plaintiffs attach affidavits limiting damages to their state court complaints. It should also be noted that there is Fifth Circuit authority which supports the consideration of such post-petition affidavits by district courts. In *Allen*, for example, the Fifth Circuit stated that "'jurisdictional facts that support removal must be judged at the time of removal, and any post-

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[45] Compare, for example, Banks v. Allstate Ins. Co., No. 4:05CV157-D-B, 2006 WL 1030008 at *4 (N.D. Miss. 2006), accepting plaintiff's affidavit, with *Holmes*, 436 F. Supp. 2d at 831-32, expressly noting the absence of an affidavit executed by the plaintiff in concluding that the amount in controversy requirement was met.

[46] DeAguilar v. Boeing Co., 47 F.3d 1404, 1412 (5th Cir. 1995) (emphasis added) (quoting *In re* Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992)).

[47] See Haley v. Ford Motor Co., 398 F. Supp. 2d 522, 528 (S.D. Miss. 2005), in which Judge Bramlette noted the absence of an affidavit limiting plaintiff's damages and gave her five days to submit one.

petition affidavits are allowable only if relevant to that period of time."[48] The Fifth Circuit thus appeared to suggest that "post-petition affidavits" might validly be considered by district courts, so long as the affidavits are relevant to the time period in which the complaint is filed. This standard appears to correspond better to the practical realities of state court litigation,[49] and it is therefore not surprising that many Mississippi district judges have elected to consider such post-petition affidavits.

The treatment of amount in controversy affidavits, post-petition or otherwise, by Mississippi district judges has largely depended upon the language of the affidavit in question. Generally speaking, district judges have tended to accept affidavits which leave no apparent "wiggle room" regarding plaintiffs' determination not to recover in excess of the jurisdictional amount.[50] As discussed *infra*, however, a recent decision before the Mississippi Supreme Court has caused district courts to re-consider exactly how "air tight" an affidavit needs to be to prevent a plaintiff from later seeking to recover in excess of the stated amount, when it suits his interests to do so.

First, however, it should be noted that the Fifth Circuit and Mississippi district courts anticipated the potential that a plaintiff's stated commitment, before a federal court, to recover no more than $75,000 might become considerably less firm when faced with the actual reality of a state court jury verdict in excess of that amount. While the Fifth Circuit has stated that a

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[48] *Allen*, 63 F.3d at 1335; *see also* Simon v. Wal-Mart Stores, Inc., 193 F.3d 848, 851 n.10 (5th Cir. 1999).

[49] It is arguably unrealistic to expect a plaintiff filing a state court complaint to, in effect, anticipate that the case will be removed and to seek to rebut the jurisdictional basis for that removal by attaching an affidavit limiting her damages to no greater than $75,000. This is particularly true considering that many such complaints assert claims against non-diverse defendants, and amount in controversy issues are frequently litigated as alternative arguments in the context of fraudulent joinder removals.

[50] *See, e.g.*, Craft v. First Family Fin. Serv., No. Civ. A. 302CV1395LN, 2003 WL 1801038 at *2 (S.D. Miss. Mar. 20, 2003) (rejecting affidavit as falling "well short of establishing, to a legal certainty, that Craft will recover less than $75,000 in the present case").

plaintiff who pleads damages less than the jurisdictional amount can "generally" bar a defendant from removal,[51] the court has noted that it has "remained vigilant to the potential for manipulation by the plaintiff who prays for damages below the jurisdictional amount even though he knows that his claim is actually worth more."[52]

The potential for manipulation by a plaintiff is particularly acute in states such as Mississippi, where the rules of civil procedure do not limit a plaintiff's recovery to the amount pled in the complaint. In *Craft v. First Family Financial Services,* Judge Lee noted that manipulation by plaintiffs was a matter of concern in view of Mississippi Rule of Civil Procedure 54(c), which provides that:

> every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled by the proof and which is within the jurisdiction of the court to grant, even if the party has not demanded such relief in his pleadings; however, final judgment shall not be entered for a monetary amount greater than that demanded in the pleadings or amended pleadings.[53]

Judge Lee further observed in *Craft* that:

> Since plaintiff's pleadings could be amended at the close of trial, and even after a jury verdict, to conform to the evidence presented and/or to the jury's verdict, then it would seem that Mississippi's procedural rules do not foreclose the kind of jurisdictional manipulation that these principles are designed to guard against.[54]

These observations proved to be prophetic, as evidenced by the 2004 Mississippi Supreme Court decision of *Wilson v. GMAC.*[55]

Wilson v. GMAC involved a case which was remanded not once but *twice* based upon a plaintiff's sworn affidavit, before two separate federal district judges, that she did not "seek" in

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[51] *Allen*, 63 F.3d at 1335.

[52] St. Paul Reinsurance Co. v. Greenberg, 134 F.3d 1250, 1254 (5th Cir. 1998) (citing DeAguilar v. Boeing Co., 47 F.3d 1404, 1411 (5th Cir. 1995)).

[53] *Craft*, 2003 WL 1801038 at *2, n.4.

[54] *Id.* at *2.

[55] Wilson v. GMAC, 883 So. 2d 56 (Miss. 2004).

excess of $75,000 against defendant GMAC. Following the second remand, a state court jury awarded the plaintiff $2,500,000 in damages, and the trial court immediately reduced the verdict to $75,000, consistent with the plaintiff's affidavit.[56] The plaintiff then filed a motion to alter or amend the final judgment, so as to allow her to accept the jury's full verdict.[57] The plaintiff argued before the Supreme Court "that 'seek' and 'recover' are very different terms, thereby not precluding her from recovering the jury award of $2,500,000 despite her affidavit to not seek in excess of $75,000 against GMAC."[58] This argument is seemingly disingenuous at best, considering that the plaintiff had twice used her affidavit to convince federal judges that there was a "legal certainty" that she would not *recover* (i.e. not merely "refuse to seek") in excess of $75,000 in state court. Apparently, this fact became much less "certain" in the eyes of the plaintiff once the jury rendered its verdict. At any rate, the Supreme Court in *Wilson* affirmed the trial court's denial of the plaintiff's motion to amend, although the court found it unnecessary to consider the estoppel issues arising from the plaintiff's affidavit and reached its decision on other grounds.[59]

While the Supreme Court thus prevented the plaintiff in *Wilson* from recovering contrary to her affidavit, the fact that she sought to do so has not gone unnoticed by Mississippi district judges. For example, Judge Mills has included language in remand orders making specific reference to *Wilson*, which language will presumably remove any possibility that plaintiffs might later dispute that they committed to neither seek *nor recover* in excess of the amount stated in their affidavit. In the 2005 decision of *Byers v. Akins*, Judge Mills considered a motion to remand in a case where the plaintiffs' complaint contained language seeking an indeterminate amount of damages, but where counsel for plaintiffs had filed an affidavit affirming that

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[56] *Id.* at 59-60.

[57] *Id.* at 60.

[58] *Id.*

[59] *Id.* at 74.

plaintiffs would not seek recovery in excess of $74,000. Noting the *Wilson* decision, Judge Mills granted the motion to remand but included cautionary language by which he sought to ensure that the plaintiffs would not, under any circumstances, *recover* in excess of the amount stated in their affidavit. Specifically, Judge Mills wrote as follows:

> If plaintiffs should wish to preserve **any right whatsoever** to recover damages, under any scenario, in excess of $74,000, then they should notify this court within ten days of its order, so that it may reconsider its ruling remanding this case. The court would further caution plaintiffs and their counsel that if they should later attempt to circumvent this court's order in the manner done by plaintiff's counsel in *Wilson v. GMAC,* 883 So. 2d 56 (Miss. 2004), then such will be dealt with by this court as contempt. The court has no reason to suspect that plaintiffs or their counsel would, in fact, attempt to circumvent this court's order, and the court cites this authority merely to make its position on this issue clear.[60]

Judge Mills thus granted the motion to remand, but his order made it clear that his ruling was expressly based on an understanding that the plaintiffs' affidavit committed them to recovering no more than $74,000 and it gave them ten days to notify the court if this understanding was in error.

A similar approach was followed by Judge Lee in a 2002 decision which preceded the *Wilson* decision and which presumably would have precluded the argument made by the plaintiff in that case. Specifically, in *Arnold v. The Purdue Pharma Company*, Judge Lee concluded that the affidavit submitted by the plaintiffs in that case fell short of establishing, to a legal certainty, that they would recover no more than $75,000.[61] However, Judge Lee granted the plaintiffs an opportunity to submit a less equivocal affidavit, writing as follows:

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[60] Byers v. Akins, No. 2:04CV313, slip op. at *2 (N.D. Miss. 2005). While *Byers* was an unpublished opinion, Judge Mills issued a nearly identical holding in the 2006 decision of *Guy Jones, Jr. Constr. Co. v. Zurich-American Ins. Group*, No. 4:05CV61, 2006 WL 1983404 (N.D. Miss. July 13, 2006).

[61] Arnold v. The Purdue Pharma Co., No: 3:02CV473, slip op. (S.D. Miss. 2002).

> While the court is of the opinion that plaintiffs' affidavits may properly be considered toward establishing that they will recover no more than $75,000, the court is of the opinion that the affidavits they have submitted fall somewhat short of what is required of them in order to accomplish this result, for while plaintiffs have stipulated in their affidavits that they will not *seek* more than $75,000, they have not stipulated that they will not *accept* more than this amount, nor do they stipulate that they will not amend the *ad damnum* clause of their complaint to conform to any eventual jury verdict in excess of $ 75,000. The court concludes, however, that plaintiffs should be given ten days to submit new affidavits in which they stipulate that they will neither seek *nor accept* any damages from defendants in excess of $ 75,000 and they will not amend their complaints so as to recover damages in excess of $ 75,000.[62]

Judge Lee thus sought to accomplish the same result as Judge Mills in *Byers*, although these judges used slightly different methods for accomplishing this objective. As such, these two decisions illustrate how Mississippi district judges utilize somewhat individualized methods for applying the Fifth Circuit standards in amount in controversy remands, but their broad objectives tend to be quite similar.

C. Increasing judicial skepticism towards bankruptcy removals

In addition to the significant decline in the number of fraudulent joinder removals in Mississippi district courts, a seemingly unrelated phenomenon involves what is, in the author's experience, a substantial decline in the number of bankruptcy removals. While the decline in fraudulent joinder removals is largely explained by the Fifth Circuit's decision in *Smallwood*, the decline in bankruptcy removals appears to result primarily from the fact that Mississippi district judges have become increasingly likely to abstain from hearing, and thus remand to state court, cases removed on the basis of bankruptcy jurisdiction.

Prior to analyzing this phenomenon, a discussion of the

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[62] *Id.* at *6-7.

basic nature of bankruptcy jurisdiction is in order. The initial grant of bankruptcy jurisdiction in 28 U.S.C. § 1334 is very broad, listing four types of cases over which the district court has bankruptcy jurisdiction, namely:[63]

1. "cases under title 11,"
2. "proceedings arising under title 11,"
3. proceedings "arising in" a case under title 11, and
4. proceedings "related to" a case under title 11.

The fourth category is by far the most relevant for bankruptcy removal purposes. The Fifth Circuit has adopted a very broad definition of "related to" jurisdiction, namely "whether the outcome of [a] proceeding could conceivably have any effect on the estate being administered in bankruptcy."[64] Applying this broad definition, Mississippi district courts have uniformly held that a federal district court has "related to" bankruptcy jurisdiction over a state law action in which one or more of the plaintiffs had filed a bankruptcy petition as to which the tort lawsuit is properly considered an asset of the bankruptcy estate. In such cases, the result of the lawsuit might conceivably have an effect on the bankruptcy estate and "related to" jurisdiction thus clearly exists.

Given the relative ease with which defendants may establish "related to" bankruptcy jurisdiction, it was at one time a very common occurrence, after the filing of a civil lawsuit in this state, for defense counsel to search bankruptcy court records for plaintiffs who had filed bankruptcies to which the lawsuit might conceivably "relate" within the meaning of 28 U.S.C. § 1334. Very frequently, in any case involving a substantial number of plaintiffs, defense counsel were successful in locating at least one such bankruptcy plaintiff, and a removal to federal court typically followed.

In considering motions to remand and/or abstain from

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[63] 28 U.S.C. § 1334(a)-(b) (2006).

[64] *In re* Wood, 825 F.2d 90, 93 (5th Cir. 1987) (quoting Pacor, Inc. v. Higgins (*In re* Pacor, Inc.), 743 F.2d 984, 994 (3d Cir. 1984)).

hearing these cases, Mississippi district courts almost always begin their analysis by acknowledging that "related to" jurisdiction exists. However, a near-consensus has gradually emerged among Mississippi district judges that, in most cases where "related to" jurisdiction is based upon nothing more than a prior bankruptcy filing by a plaintiff, either the mandatory or discretionary abstention provisions of 28 U.S.C. § 1334(c) applies.[65] As discussed *infra*, the primary disagreement among district judges in most cases involves *which* of the two forms of abstention is applicable. The end result is generally the same, however: a non-appealable district court ruling abstaining from hearing the case and remanding it to state court.

The mandatory abstention provisions of 28 U.S.C. § 1334(c)(2) require the court to abstain in cases where

1. A motion has been timely filed requesting abstention.
2. The cause of action is essentially one that is premised on state law.
3. The proceeding is non-core or related to the bankruptcy case.
4. The proceeding could not otherwise have been commenced in federal court absent the existence of the bankruptcy case.
5. The proceeding has already been commenced and can be timely adjudicated in a state court forum.[66]

Thus, in cases where a timely motion for abstention has been filed, the law gives the court no choice but to abstain from hearing non-core cases premised on state law which could not have been commenced in federal court absent the existence of the bankruptcy case, so long as the case can be timely adjudicated in state court. It should be apparent that the crucial factor in the mandatory abstention analysis is whether or not the proceeding in question is a "core" bankruptcy

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[65] 28 U.S.C. 1334(c) (2006).

[66] Blakeley v. United Cable Sys., 105 F. Supp. 2d 574, 583 n.9 (S.D. Miss. 2000) (citing 28 U.S.C. § 1334(c)(2)).

proceeding.

The reference to "core" and "non-core" proceedings requires further explanation. The federal statutes which give rise to bankruptcy jurisdiction were modified by Congress in response to the U.S. Supreme Court's 1982 decision in *Northern Pipeline Construction Company v. Marathon Pipe Line Company*.[67] In *Marathon*, the Supreme Court held that Congress had overstepped its constitutional limits by assigning overly broad jurisdiction to non-Article III bankruptcy judges in the 1978 Bankruptcy Code.[68] Following *Marathon*, it became a matter of urgency for Congress to statutorily re-define the jurisdictional parameters of the bankruptcy courts. Congress elected to accomplish this by enacting 28 U.S.C. § 157, which creates a statutory distinction between so-called "core" and "non-core proceedings," and by restricting the power of bankruptcy courts to adjudicate the latter.[69] While the precise scope of bankruptcy courts' authority to hear "core" and "non-core" proceedings is beyond the scope of this article, what is important for present purposes is that the same "core" and "non-core" dichotomy is used as a factor in determining whether mandatory or discretionary abstention of cases removed on the grounds of bankruptcy jurisdiction are applicable.

A lengthy list of examples of "core" proceedings is set forth in 28 U.S.C. § 157(b)(2), and some Mississippi district judges have shown a willingness to conclude that a tort lawsuit based upon Mississippi law fell under one or more of these examples.[70] In *Allen v. City Finance Company*, for example, Judge Barbour concluded that because the plaintiffs in that case had filed their state court lawsuit against the defendant after it had filed proofs of claim in the bankruptcy cases of three of the plaintiff debtors, the case constituted a core proceeding under § 157(b)(2)(C).[71] Judge Barbour reasoned that under § 157(b)(2)(C),

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[67] 458 U.S. 50 (1982).

[68] *Id.* at 87.

[69] 28 U.S.C. § 157 (2006).

[70] *See, e.g.*, Chickaway v. Bank One Dayton, N.A., 261 B.R. 646 (S.D. Miss. 2001); Allen v. City Fin. Co., 224 B.R. 347, 352 (S.D. Miss.1998).

[71] *Allen*, 224 B.R. at 352.

"counterclaims by the estate against persons filing claims against the estate" were considered "core" matters and that the claims asserted by the plaintiffs in this lawsuit were, "in essence, counterclaims to the proofs of claims filed by [the defendant] in the bankruptcy estates."[72]

Other Mississippi district judges have been more reluctant to conclude that a civil action based on state law constitutes a core proceeding. Typical of these cases is Judge Davidson's opinion in *Hill v. Banks*, wherein he wrote that:

> In the present case, the Plaintiff's suit is not based on any right created by federal bankruptcy law. The Plaintiff's claim is one based solely on state tort law. Therefore, because the claims do not arise out of the bankruptcy proceeding, it is a non-core proceeding.[73]

Judge Davidson thus concluded that the case constituted a "non-core" proceeding and that the other requirements of mandatory abstention were met as well:

> In the present case, the Plaintiff can establish all the elements required for mandatory abstention. First, the plaintiffs filed a timely motion to abstain. Second, the underlying nature of their suit is a personal injury and negligence action based upon state law. Third, this proceeding is related to the bankruptcy, but it does not arise under or arise in Title 11. Fourth, this Court would only have jurisdiction based upon the bankruptcy proceeding. Finally, this proceeding can be timely adjudicated in state court. The discovery deadlines have passed and trial can proceed quickly. Therefore, the Plaintiff has met all elements of mandatory abstention and this Court finds that it shall abstain and remand this case to state court.[74]

Other district courts have followed a similar analysis to that utilized by Judge Davidson in concluding that mandatory abstention was warranted in cases involving civil actions based

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[72] *Id.* at 382 (quoting 28 U.S.C. § 157(b)(2)(c) (2006)).

[73] Hill v. Banks, No. 2:05CV179-D-A, 2005 WL 2877727 at *2 (N.D. Miss. Oct. 31, 2005).

[74] *Id.* at *2.

on state law.[75]

While there is thus some disagreement among Mississippi district judges (as well as among courts nationwide) regarding the circumstances under which an ordinary state law action may constitute a "core proceeding," it must be emphasized that this disagreement usually does not effect the ultimate result of any motion to abstain/remand. "Even when mandatory abstention" under § 1334(c)(2) "does not apply, a [district] court [still] has the *discretion* to abstain from deciding either core or non-core proceedings under § 1334(c)(1) if the interests of justice, comity, or respect for state law so require."[76] "Similarly, 28 U.S.C. § 1452(b) permits a federal district court, on any equitable ground, to remand a claim related to a bankruptcy case which has been removed to federal court."[77]

Mississippi district courts have employed the same fourteen-part test for determining whether discretionary abstention and/or equitable remand is appropriate,[78] and, as discussed below, decisions applying this test have found discretionary abstention to be applicable in most cases. In cases where one or more out of multiple plaintiffs have filed a bankruptcy petition to which their claims "relate" within the meaning of § 1334, district judges will sometimes sever the claims of those "bankruptcy plaintiffs," retain jurisdiction over their claims, and remand the remaining claims.[79] A review of Mississippi district court authority reveals, however, that district courts are increasingly unwilling to take even this limited step. Typical of these decisions is Judge Lee's decision in *Smith v. Wal-Mart Stores*, wherein he wrote as follows:

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[75] Williams v. Beneficial Miss., Inc., No. Civ. A. 2:04CV151-B-A, 2005 WL 1994488 (N.D. Miss. Aug. 17, 2005) (Biggers); Walton v. Tower Loan of Miss., 338 F. Supp. 2d 691, 698 (N.D. Miss. 2004) (Mills); Dubose v. Merchants & Farmers Bank, 318 F. Supp. 2d 419, 427 (S.D. Miss. 2003)(Wingate).

[76] Vig v. Indianapolis Life Ins. Co., 336 B.R. 279, 285 (S.D. Miss. 2005) (quoting Davis v. Life Investors, Ins. Co. of America, 282 B.R. 186, 191 (S.D. Miss. 2002)).

[77] *Id.*

[78] Searcy v. Knostman, 155 B.R. 699, 710 (S.D. Miss. 1993).

[79] *See, e.g.*, Battle v. Pre-Paid Legal Services, Inc., No. 305CV609LN, 2006 WL 317180 at *2 (S.D. Miss. Feb. 9, 2006).

> A review of the papers submitted by defendants in connection with their response to the motion to remand confirms that, in fact, the court does have "related to" bankruptcy jurisdiction on the basis of the bankruptcies of at least one, and potentially more plaintiffs who either had pending bankruptcies at the time the case was filed, or who filed for bankruptcy during the pendency of the case . . . . However, while the court could exercise jurisdiction over the case on the basis of these bankruptcies, in the exercise of its discretion and in accordance with 28 U.S.C. § 1452(b) and/or 28 U.S.C. § 1334(c), it chooses not to do so. Simply put, this case is a non-core proceeding involving solely state law claims and issues which may readily be resolved in state court, over which the court otherwise lacks jurisdiction. There is, in the court's view, no practical benefit in retaining jurisdiction over the claims of the bankruptcy plaintiffs.[80]

Judge Lee's observations regarding the absence of any "practical benefit" to retaining jurisdiction over state law tort claims in *Smith*[81] is one which has increasingly been made by other Mississippi district judges as well. In *Walton v. Tower Loan of Mississippi*, for example, Judge Mills wrote as follows:

> [T]he purpose of the present lawsuit is simply to place a value on the asset (i.e. plaintiffs' cause of action) that defendants allege to be an asset of plaintiffs' bankruptcy estate, and this valuation may be performed equally well in state court. The court sees little, if any, practical benefit in retaining jurisdiction over this case when the bankruptcy court and the bankruptcy trustee may protect the interests of plaintiffs' creditors, regardless of whether this lawsuit is tried in state or federal court. Although plaintiffs' bankruptcy creditors do have legitimate interests in the disposition of this case (assuming that the lawsuit is deemed to be an asset of the bankruptcy estate), the intervention of this court is not required to protect those interests.[82]

Similarly, in *Dubose v. Merchants and Farmers Bank*, Judge

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[80] Smith v. Wal-Mart Stores, Inc., 305 F. Supp. 2d 652, 657-58 (S.D. Miss. 2003).

[81] *Id.*

[82] Walton v. Tower Loan of Miss., 338 F. Supp. 2d 691, 698 (N.D. Miss. 2004).

Wingate wrote that, while he had the option of severing the claims of the bankruptcy plaintiffs from the remaining plaintiffs and retaining jurisdiction over them, he would decline to do so on grounds that such "would impose multiple costs on the parties and occasion the exertion of duplicative efforts by the state court and federal court."[83] These judicial economy concerns raised by Judge Wingate would appear to be applicable in virtually all cases in which severance of bankruptcy plaintiffs is sought.

A review of Mississippi authority thus reveals increasing skepticism among district judges regarding the basic usefulness and wisdom of their retaining bankruptcy jurisdiction over state law tort lawsuits based solely on the presence of one or more bankruptcy plaintiffs. It may fairly be assumed that, if a case involves special circumstances whereby a federal court's retention of bankruptcy jurisdiction will protect the bankruptcy estate in a meaningful and practical sense which outweighs the delays and expense which it causes, then bankruptcy removals may still prove useful. If, however, the district court is being called upon to do nothing more than adjudicate a state law action which happens to be an asset of a plaintiff's bankruptcy estate, it seems likely that defendants will continue to face an uphill battle in persuading most Mississippi district judges to retain jurisdiction over the case. It is thus unsurprising that recent years have seen a notable decrease in the number of bankruptcy removals, and it may be fairly assumed that this trend will continue.

D. Expanded Federal Jurisdiction in Class Actions and Multi-Plaintiff Cases

While the general trend in Mississippi has been towards fewer removals, there are areas in which it has become *easier* for Mississippi defendants to remove cases to federal court. One such area is in the mass tort litigation context. Effective February 18, 2005, the Class Action Fairness Act (CAFA) generally provides for federal jurisdiction over any "class action"

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[83] Dubose v. Merchants & Farmers Bank, 318 F. Supp. 2d 419, 426 (S.D. Miss. 2003).

(which may include mass-joined actions) if the class has 100 or more proposed members, if the matter in controversy exceeds $5,000,000 (in the aggregate), and if minimal diversity exists between the parties.[84] The CAFA sets forth complex exceptions to the general rule, whereby district courts are either permitted or required to abstain from hearing certain local controversies, based upon the application of a series of mandatory and discretionary abstention provisions.[85]

At least so far, the impact of the CAFA has been very limited in Mississippi, presumably because this remains the only state which has not adopted a class action rule. Moreover, the sort of mass-joined actions which might have otherwise implicated the CAFA's provisions have been largely abolished by Mississippi Supreme Court rulings adopting a much more restrictive interpretation of permissible joinder under Rule 20 of the Mississippi Rules of Civil Procedure. It is thus somewhat ironic that, in Mississippi at least, the provisions of the CAFA were largely mooted around the same time as they were enacted. Indeed, research revealed no Mississippi district court decisions mentioning the CAFA, and the handful of Fifth Circuit decisions dealing with the Act involve rulings of Louisiana district judges.[86]

Although the impact of the CAFA in Mississippi has thus

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[84] 28 U.S.C. § 1332 (d)(1)-(11) (Supp. 2005).

[85] Specifically, 28 U.S.C. § 1332(d)(4)(B) requires abstention in cases where more than two-thirds of all plaintiffs and the primary defendants are citizens of the state where the lawsuit was filed. The statute contains another complex mandatory abstention provision, a discussion of which is beyond the scope of this article. *See* 28 U.S.C. § 1332(d)(4)(A). In cases where between one-third and two-thirds of plaintiffs and the primary defendants are residents of the state where the action was filed, § 1332(d)(3) sets forth a series of factors for the district court to apply in determining whether to retain jurisdiction of the case. The statute generally provides that, if one-third or fewer of all class plaintiffs are citizens of the state where the action was filed, then the district court must retain jurisdiction over the case. *See* 28 U.S.C. §§ 1332(d)(3)-(4).

The preceding provisions are considerably more complex than described above, and they will likely prove to be the bane of district judges and law clerks nationwide. This is particularly true considering that, contrary to general removal practice, 28 U.S.C. § 1453(c) provides for discretionary appellate review of district court orders remanding class actions to state court.

[86] *See, e.g.*, Braud v. Transp. Serv. Co. of Ill., 445 F.3d 801 (5th Cir. 2006); Wallace v. La. Citizens Prop. Ins. Corp., 444 F.3d 697 (5th Cir. 2006).

been limited, the Act's minimal diversity requirement will make it easier for those Mississippi plaintiffs who wish to file a federal class action to meet the diversity requirement. It is unclear to what extent Mississippi plaintiffs will benefit from the CAFA's $5,000,000 aggregated amount in controversy requirement, however. As discussed previously, the Fifth Circuit's 1995 decision of *Allen v. R & H Oil & Gas Company* held that, under Mississippi law, the full amount of alleged punitive damages must be counted against each plaintiff to determine whether the $75,000 amount in controversy is met.[87] While *Allen* involved a Rule 20 joinder of plaintiffs rather than a Rule 23 class action, language in the opinion appears to indicate that its holding applies to class actions as well,[88] and Mississippi district courts have so interpreted *Allen*.[89] As a result, in class actions where meeting the amount in controversy is a concern, prospective class plaintiffs seeking punitive damages under Mississippi law might well be better off proceeding under *Allen*, which permits aggregation of punitive damages for determining whether the $75,000 amount in controversy requirement is met, as opposed to the CAFA, which permits aggregation of all claims, but for the purpose of meeting a much higher $5,000,000 jurisdictional threshold. Of course, nothing prevents plaintiffs from asserting jurisdiction under *both* the CAFA and *Allen*, as these represent two independent bases for federal jurisdiction.

In addition to the CAFA, another recent expansion of federal jurisdiction in the multi-plaintiff context has resulted from the June 2005 U.S. Supreme Court decision of *Exxon Mobil Corporation v. Allapattah Services*.[90] The Supreme Court in *Exxon Mobil* interpreted the supplemental jurisdiction statute[91] as providing that where at least one named plaintiff satisfies the amount in controversy requirement, supplemental jurisdiction

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[87] Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1333-34 (5th Cir. 1995).

[88] *Id.* at 1334.

[89] Carpenter v. Rocky Mountain Radar, Inc., No. 4:05CV01-M-B, 2007 WL 551762 (N.D. Miss. Feb. 21, 2007); Amos v. CitiFinancial Corp., 243 F. Supp. 2d 587 (N.D. Miss. 2003).

[90] Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005).

[91] 28 U.S.C. § 1367 (2000).

exists over the claims of "other plaintiffs in the same Article III case or controversy, even if those claims are for less than the jurisdictional amount."[92] The Supreme Court thus interpreted § 1367 as abrogating its 1973 decision in *Zahn v. International Paper Company,*[93] which had prohibited aggregation of the claims of class plaintiffs for meeting the amount in controversy requirement.

While *Exxon Mobil* is clearly a very significant decision, its impact is somewhat more limited in the Fifth Circuit, which had, in the 1995 decision of *In re Abbott Laboratories,* already concluded that unnamed class members need not meet the amount in controversy requirement, so long as named class members do.[94] It should be emphasized, however, that *Exxon Mobil* is considerably broader than *In re Abbott,* since the latter was limited to the class action context, while the *Exxon Mobil* holding applies equally to ordinary Rule 20 (but, paradoxically, not Rule 19) joinder of plaintiffs.[95] The holding in *Exxon Mobil* is also broader in the class action context, since the Supreme Court made it clear that its holding permits named, as well as unnamed, class members to assert supplemental jurisdiction

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[92] *Exxon Mobil*, 545 U.S. at 549.

[93] Zahn v. Int'l Paper Co., 414 U.S. 291, 294, *superseded by statute*, 28 U.S.C. § 1367 (2000), *as recognized in Exxon Mobil*, 545 U.S. at 558.

[94] *In re* Abbott Laboratories, 51 F.3d 524, 525 (5th Cir. 1995).

[95] *See* FED. R. CIV. P. 19-20. The fact that *Exxon Mobil* applies equally to Rule 20 permissive joinder of plaintiffs is made clear by the majority's ruling in the case of *Ortega v. Star-Kist Foods, Inc.*, which the Supreme Court consolidated into the *Exxon Mobil* appeal. *Exxon Mobil*, 545 U.S. at 551. In *Ortega*, the minor plaintiff's claim met the amount in controversy requirement, but her parents' claims did not. *Id.* The Supreme Court reversed the First Circuit's conclusion that there was no supplemental jurisdiction as to these Rule 20 plaintiffs. *Id.* at 572. The Court based this ruling upon an interpretation of 28 U.S.C. § 1367(a) (2000), and it should be noted that, for whatever reason, 28 U.S.C. § 1367(b) excepts Rule 19 plaintiffs, but not Rule 20 plaintiffs, from the supplemental jurisdiction provisions of § 1367(a). *Exxon Mobil*, 545 U.S. at 559-60. As noted by Justice Ginsburg in her dissent, this results in the anomaly that "Beatriz Ortega's family members can remain in the action because their joinder is merely permissive. If, however, their presence was 'needed for just adjudication,' their dismissal would be required." *Id.* at 589 n.8. (Ginsburg, J., dissenting) (quoting FED. R. CIV. P. 19). The majority acknowledged this anomaly, but concluded that, if it was the result of a drafting error in § 1367(b), then "it is up to Congress rather than the courts to fix it." *Id.* at 565 (majority opinion).

where "some, but not all, of the plaintiffs . . . allege a sufficient amount in controversy."[96]

The enactment of the CAFA and the rendering of the *Exxon Mobil* decision are clearly important developments, but it must be emphasized that whatever limited impact they have had in Mississippi district court practice is far outweighed by impact of the *Smallwood* decision in the opposite direction. It is true that the CAFA is potentially a very significant statute in Mississippi, and it will likely reach such potential in the event that the Mississippi Supreme Court adopts a state class action rule or if the mass tort litigation phenomenon returns to Mississippi. Barring such developments, the CAFA, and the *Exxon Mobil* decision, may prove to be of greater significance in cases where plaintiffs actually *wish* to maintain multi-party actions in federal court.

While the CAFA and *Exxon Mobil* may be seen as invitations for Mississippi plaintiffs to file multi-party actions in federal court, this is an invitation which, at least judging by reported case law, few Mississippi plaintiffs have accepted to date. This may arise partly from the fact that, while certain jurisdictional requirements have been lessened, the standards for certifying federal class actions under Rule 23 and the joinder requirements of Rule 20 have not been lessened.[97] Plaintiffs may also fear what they see as an increasingly conservative federal judiciary in the Fifth Circuit. At the same time, the procedural limitations on multi-party actions in Mississippi may mean that federal court is the "only game in town" for certain prospective plaintiffs, and for these plaintiffs, the enactment of the CAFA and the *Exxon Mobil* decision may be welcome news. For other plaintiffs who would rather take their chances in state court, these developments will likely prove to be decidedly unwelcome, since they make it somewhat more likely that their cases will be successfully removed to federal court, assuming that the obstacles presented by *Smallwood* can be surmounted.

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[96] *Exxon Mobil*, 545 U.S. at 566.

[97] *See* FED. R. CIV. P. 20, 23.

E. Changes in Mississippi Substantive Law Making Removal Easier

In diversity cases, a defendant's ability to remove a case to federal court is impacted not only by U.S. Supreme Court and Fifth Circuit Court of Appeals decisions, but also by changes in the underlying state substantive law. When the underlying state law is altered to make recovery against certain non-diverse defendants more difficult, then it becomes correspondingly easier to remove cases to federal court on the basis of the fraudulent joinder of those defendants.

In the nursing home litigation context, the Mississippi Supreme Court's 2006 decision of *Howard v. Estate of Harper* ex rel. *Harper*,[98] has made it far more difficult for plaintiffs to hold nursing home administrators personally liable for injuries suffered by residents at nursing home facilities. In rejecting the various claims asserted by the plaintiff against a nursing home administrator, the supreme court in *Howard* concluded that "no common law duty is owed by a nursing home's licensee or administrator to that nursing home's patients."[99] Such administrators have traditionally provided plaintiffs with diversity-destroying defendants to sue in nursing home cases, thus preventing the successful removal of those cases to federal court. In light of *Harper*, it may be anticipated that far more nursing home personal injury cases will be tried in federal court than was previously the case.

In the pharmaceutical litigation context, the Mississippi Legislature enacted, as part of its "tort reform" legislation, § 11-1-62 of the Mississippi Code, which seeks to prevent specified medical professionals from being held strictly liable in pharmaceutical cases.[100] The statute attempts to accomplish this by requiring that the plaintiff plead "specific facts which, if proven, amount to negligence on the part of the medical

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[98] Howard v. Estate of Harper *ex rel.* Harper, 947 So. 2d 854 (Miss. 2006).

[99] *Id.* at 862.

[100] MISS. CODE ANN. § 11-1-62 (Supp. 2007).

provider."[101] In the 2002 decision of *Moore v. Memorial Hospital of Gulfport*, the Mississippi Supreme Court made it more difficult for plaintiffs to hold pharmacists liable in pharmaceutical cases by holding that a pharmacist has no legal duty to warn the customer for whom the prescription is filled of dangers inherent in the use of the prescribed medication, unless (a) it is undisputed that the customer had informed the pharmacy of health problems which contraindicated the use of the drug, or (b) the pharmacist filled the prescription in quantities inconsistent with the recommended dosage guidelines.[102] In light of these developments, it seems clear that Mississippi plaintiffs will find it considerably more difficult to find resident defendants to sue in pharmaceutical cases than was previously the case.[103]

Perhaps the most significant area in which a change in Mississippi substantive law has made it easier to remove cases

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[101] § 11-1-62.

[102] Moore v. Memorial Hosp. of Gulfport, 825 So. 2d 658, 665 (Miss. 2002), *overruled by* Caves v. Yarbrough, No. 2006-CA-01857-SCT, 2007 WL 3197504, at *5, *7 (Miss. Nov. 1, 2007).

[103] It should be noted that pharmaceutical (as well as certain products liability) cases which are removed to federal court very frequently end up being transferred to a multi-district litigation (MDL) court set up specifically to handle claims relating to a specific drug or product. It is frequently the case that such MDL courts are so overburdened with work that the plaintiff's motion to remand, whether meritorious or not, languishes on the MDL court's docket for a lengthy period of time. In certain cases, this gives rise to the phenomenon whereby a defendant will remove a case to federal court without any good basis for doing, in the hope that the case will be sent to the "black hole" of an MDL court and languish there.

Unfortunately, the MDL system is set up in such a way that this rather cynical maneuver is very often successful. As a result, plaintiffs will sometimes seek an expedited ruling on motions to remand from the Mississippi district courts to which the cases are initially removed. However, there is frequently a reluctance on the part of these district judges to deviate from the de facto "first come, first served" presumption established by the Civil Justice Reform Act of 1990, based upon the preferences of one party. *See* Pub. L. No. 101-650, 104 Stat. 5089 (codified in scattered sections of title 28 of the United States Code). These district judges appear to conclude that, while the MDL system may well have serious flaws, it is not up to them to correct these flaws by deviating from customary standards relating to priority of motions. As observed by one district judge: "expediting consideration of cases based upon a particular party's litigation preferences is a slippery slope upon which this court is unwilling to tread." Terney v. Baush & Lomb, No. 2:07cv45 (N.D. Miss. 2007).

to federal court is in products liability cases. This phenomenon arises from recent enactments of the Mississippi Legislature, as interpreted by Mississippi district courts. Some of the most intense debate at the Legislature's 2002 and 2004 special sessions dealing with tort reform involved the liability of retailers in products liability cases. The debate on this issue was so intense primarily because it is retailers who have traditionally provided Mississippi plaintiffs with resident defendants to sue in products cases, thus precluding the successful removal of most of these cases to federal court on the basis of diversity jurisdiction.

At the 2004 special session, the Legislature provided substantial protection to retailers in products liability cases through the enactment of § 11-1-63(h) of the Mississippi Code, which provides as follows:

> In any action alleging that a product is defective . . . the seller of a product other than the manufacturer shall not be liable unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; or the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; or the seller had actual or constructive knowledge of the defective condition of the product at the time he supplied the product.[104]

Section 11-1-63(h) expressly provides that it was drafted to "immunize innocent sellers who are not actively negligent, but instead are mere conduits of a product." This statement of intent notwithstanding, some of the language of the statute can arguably be read as providing for liability against retailers who were not, in fact, actively negligent. In particular, it appears that the "constructive notice" provision of § 11-1-63(h) represents a compromise measure which renders the statute somewhat less powerful for retailers than it would otherwise be. At the same time, the law in this area is clearly more favorable

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[104] MISS. CODE ANN. § 11-1-63(h) (Supp. 2007).

for retailers than it was prior to the Legislature's tort reform enactments, as demonstrated by one early Mississippi district court decision applying § 11-1-63(h).

In the 2007 decision of *Fife v. Polaris Industries, Inc.*,[105] Judge Bramlette denied a motion to remand on the basis of § 11-1-63(h) in a products liability case involving an all-terrain vehicle (ATV). The plaintiff had named the Mississippi retailer which sold him the vehicle as a defendant, alleging, *inter alia*, that the retailer knew of a pending recall involving the ATV and that it took no steps to warn the plaintiff of the defects in the vehicle. In concluding that the retailer had been fraudulently joined, Judge Bramlette noted that this defendant could not have had knowledge of any pending recall when it sold the subject ATV in June 2004 since the manufacturer only issued a recall bulletin to dealers on August 31, 2004. Judge Bramlette thus concluded that the retailer had no "actual or constructive knowledge of the defective condition of the product at the time [the seller] supplied the product" within the meaning of § 11-1-63(h), and he accordingly denied the motion to remand.[106]

While § 11-1-63(h) thus clearly represents a powerful tool for defendants seeking to remove products liability cases to federal court, the limitations of the statute were highlighted by another recent district court decision. In the 2006 decision of *Johnson v. Daimler Chrysler Corporation*,[107] Judge Starrett found that there was a question of fact as to whether a retailer either knew or should have known of a defect in an automobile at the time of the sale of the vehicle and that remand was therefore in order.[108] Judge Starrett based this conclusion upon records which indicated that the manufacturer had begun providing retailers with notices of defects in the vehicle model at issue months before plaintiffs purchased their vehicle.[109] Judge

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[105] Fife v. Polaris Indus., Inc., No. 506-CV-42 (DCB)(JMR), 2007 WL 534215 (S.D. Miss. Feb. 15, 2007).

[106] *Id.* at *1-2.

[107] Johnson v. Daimler Chrysler Corp., No. 2:06CV36KS-MTP, 2006 WL 3511438 (S.D. Miss. Dec. 5, 2006).

[108] *Id.* at *2.

[109] *Id.*

Starrett accordingly concluded that the facts could potentially establish that the retailer had actual or constructive knowledge of the defects in the vehicle at the time of the sale and that § 11-1-63(h) thus provided no basis for the dismissal of the retailer.[110]

Although § 11-1-63(h) represents current, and presumably future, Mississippi law in this area, it should be noted that a different "innocent seller" statute applies to actions filed between January 1, 2003, and August 31, 2004. During the 2004 special session, the Legislature repealed one of the key enactments of the 2002 special session: the short-lived § 11-1-64 of the Mississippi Code.[111] Section 11-1-64 had, rather creatively, attempted to provide legal protection for retailers while still purporting to retain them as defendants for jurisdictional purposes, presumably in order to defeat federal removal jurisdiction. Initially, it appeared that, for cases filed between January 1, 2003, and August 31, 2004, the statute would permit retailers to be dismissed in state court at an early stage of litigation while still being considered diversity-destroying defendants for jurisdictional purposes. Indeed, § 11-1-64 was based on a very similar Missouri statute, and Missouri federal courts had consistently interpreted the Missouri statute as not giving rise to federal jurisdiction.[112]

In what must have been a rather surprising development to the Legislature, at least three Mississippi federal district judges, beginning with Judge Pepper's 2004 decision in *Burton v. Werner Corporation*, disagreed with the approach of the Missouri federal courts and interpreted § 11-1-64 as giving rise to diversity jurisdiction based upon fraudulent joinder.[113] This is an ironic result, considering that the Legislature likely repealed § 11-1-64 and replaced it with § 11-1-63(h) based upon an expectation that Mississippi federal courts would follow the

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[110] *Id.*

[111] MISS. CODE ANN. § 11-1-64 (repealed 2004).

[112] *See, e.g.*, Pender v. Bell Asbestos Mines, Ltd., 46 F. Supp. 2d 937, 940 (E.D. Mo. 1999).

[113] Burton v. Werner Corp., 335 F. Supp. 2d 734, 735-36 (N.D. Miss. 2004); Henderson v. Ford Motor Co., 340 F. Supp. 2d 722, 726 (N.D. Miss. 2004); Haley *ex rel* Davis v. Hammett Auto., Inc., 341 F. Supp. 2d 634, 637 (S.D. Miss. 2004).

lead of the Missouri federal courts. While § 11-1-63(h) clearly provides substantial protection to retailers, the "constructive notice" provisions of the statute appear to provide plaintiffs with a better chance of defeating removal than they had under § 11-1-64, as applied by Mississippi district courts. This is particularly true when one considers that the Fifth Circuit in *Smallwood* wrote in favor of a Rule 12(b)(6)-type analysis in fraudulent joinder cases, which, as discussed previously, is highly deferential to the allegations of the plaintiff's complaint. Nevertheless, while retailers may lament the "one that got away," § 11-1-63(h) still represents, to reiterate, a significant improvement for retailers upon the pre-tort reform law in Mississippi. It therefore seems certain that the coming years will see a greater number of products liability cases tried in federal court, compared to the pre-tort reform era in Mississippi.

F. Trends in Removals Based on Federal Question Jurisdiction

There are comparatively few trends to discuss in the area of federal question jurisdiction removals, since, for the most part, the law in this context is well settled. Whether a claim "arises under" federal law so as to confer federal question jurisdiction under 28 U.S.C. § 1331 is governed by the well-pleaded complaint rule, which provides that federal jurisdiction exists only when a federal question is presented "on the face of the plaintiff's properly pleaded complaint."[114] Accordingly, as a general matter, a plaintiff either seeks recovery under federal law, in which case federal question jurisdiction exists, or he does not, in which case it almost certainly does not exist. Thus, in a large majority of cases, the parties are able to agree on whether federal question jurisdiction exists without requiring a ruling on the issue from the district court.

One argument which does recur frequently in federal question removals in Mississippi involves complaints filed in state court which make reference to acts of racial discrimination. Mississippi has no statutory or common law cause of action forbidding such discrimination, and, in cases where such

[114] Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987).

allegations are raised, Mississippi defendants will sometimes attempt to argue that the complaint could only state a claim under federal law. Defendants' arguments in this regard are inevitably defeated, however, by the limited scope of the so-called "complete preemption" doctrine.

The doctrine of complete preemption defines limited categories of state law claims that are "completely preempted" such that "any civil complaint raising this select group of claims is necessarily federal in character," no matter how it is characterized by the plaintiff in the complaint.[115] However, the U.S. Supreme Court has found complete preemption to exist only in the limited areas of federal labor relations law, certain ERISA cases, and usury claims against national banks.[116] Outside of these limited areas, a plaintiff is free to seek recovery solely under state law. Accordingly, Mississippi district courts have consistently held that defendants may not seek to transform state law claims making reference to "discrimination" into federal ones, regardless of whether such discrimination claims are viable under Mississippi law.[117]

While defendants have thus found it difficult to assert federal question jurisdiction arising out of complaints seeking recovery solely under state law, a recent U.S. Supreme Court decision may breathe some limited new life into federal question jurisdiction removals in Mississippi and elsewhere. In the 2005 decision of *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing,*[118] the U.S. Supreme Court appeared to expand upon the "substantial federal question" jurisdiction doctrine somewhat as it had been applied in Mississippi and elsewhere. The substantial federal question doctrine holds that in certain cases where plaintiff has not

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[115] Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987).

[116] Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003); Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 367 (5th Cir.1995).

[117] *See, e.g,* Adams v. Gen. Motors Acceptance Corp., 307 F. Supp. 2d 812, 816 (N.D. Miss. 2004) (applying Waste Control Specialists v. Envirocare of Texas, Inc., 199 F.3d 781 (5th Cir. 2000)); Owens *ex rel.* Owens v. Catholic Diocese of Jackson, Miss., 169 F. Supp. 2d 588, 594 (S.D. Miss. 2001).

[118] Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005).

asserted a federal cause of action in his complaint, federal question jurisdiction may nevertheless lie over state law claims that implicate "significant federal issues."[119] This doctrine has been raised occasionally by Mississippi defendants in cases where the plaintiff's complaint does not expressly seek recovery under federal law, but where it nevertheless makes reference to it or where the defendant asserts that it would be necessary for the court to refer to federal law in resolving the case.

Until recently, the utility of the substantial federal question doctrine, in Mississippi and elsewhere, has been limited by the U.S. Supreme Court's 1986 decision in *Merrell Dow Pharmacy, Inc. v. Thompson.*[120] *Merrell Dow* has been widely interpreted, including by the Fifth Circuit, as requiring that, in order to be "substantial," a federal issue must give rise to a private cause of action.[121] Mississippi district courts have duly applied this requirement in concluding that federal questions were not sufficiently "substantial" to support federal question jurisdiction.[122] It is therefore significant that the Supreme Court in *Grable* retreated somewhat from *Merrell Dow*, concluding that the absence of a private right of action is "relevant to, but not dispositive of, the 'sensitive judgments about congressional intent' that § 1331 requires."[123] The Supreme Court in *Grable* held that the overriding consideration in this context should be whether "a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."[124]

Although the Supreme Court has thus retreated from the "private cause of action" requirement, the requirement that any

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[119] *Id.*

[120] Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 814 (1986).

[121] Willy v. Coastal Corp., 855 F.2d 1160, 1169 (5th Cir.1988) (citing *Merrell Dow*, 478 U.S. at 813-16).

[122] *See, e.g.*, Burton v. Southwood Door Co., 305 F. Supp. 2d 629, 634-35 (S.D. Miss. 2003).

[123] *Grable*, 545 U.S. at 318 (quoting *Merrell Dow*, 478 U.S. at 804).

[124] *Id.* at 314.

federal question be "actually disputed and substantial" should nevertheless prevent any flood of federal question removals in Mississippi district courts. Indeed, in the 2007 decision of *Ball v. Argent Mortgage Company*, Judge Lee, applying *Grable*, remanded a case involving purely state law claims where the defendant had argued that the court would "be required to examine the Truth in Lending Act, in order to determine the validity of the Plaintiff's claims."[125] Judge Lee rejected this argument, concluding that any federal issue to which the court might be required to refer was not "actually disputed and substantial."[126] Judge Starrett reached a similar conclusion in the 2007 decision of *HC Services, Inc. v. Hiller Investments, Inc.*,[127] noting that the U.S. Supreme Court has recently acknowledged that the *Grable* holding was a "very narrow" one.[128] While it thus seems likely that *Grable* will not serve to greatly impact federal question jurisdiction removals in this state, it is nevertheless apparent that the removal of the *Merrell Dow* "private cause of action" requirement is a significant holding which should have at least some impact at the district court level.

III. Trends in Summary Judgment Motion Practice in Employment Discrimination and 42 U.S.C. § 1983 Cases

In an April 11, 2007, address at the University of Mississippi Law School, Judge Davidson estimated that when he entered the federal judiciary in 1985, roughly ten percent of his civil cases ended with a grant of summary judgment. He further estimated that by 2006, that figure had reached twenty-five per cent. Judge Davidson's experiences are likely typical of Mississippi district judges in general. The Fifth Circuit has established such a clear, and relatively stringent (for the

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[125] Ball v. Argent Mortg. Co., No. 3:06CV587TSL-JCS, 2007 WL 710156, at *3 (S.D. Miss. March 6, 2007).

[126] *Id.*

[127] HC Servs., Inc. v. Hiller Invs., Inc., No. 2:06CV160KS-MTP, 2007 WL 1032362 (S.D. Miss. Mar. 30, 2007).

[128] HC Servs., 2007 WL 1032362, at *5 (citing Empire Healthchoice Assurance, Inc. v. McVeigh, 126 S. Ct. 2121, 2137 (2006)).

plaintiff), body of case law regarding the standards for considering summary judgment motions that a litigant will generally find similar treatment of his or her motion regardless of whether it is considered by a district judge in Oxford, Aberdeen, Greenville, Jackson, or Gulfport. This section of the article discusses current trends in summary judgment practice in the two most common areas of district court civil litigation in Mississippi: employment discrimination claims and constitutional claims asserted under 42 U.S.C. § 1983.

A. Summary Judgment Practice in Employment Discrimination Cases: Increased Use of Mixed-Motive Analysis

Recent years have seen a dramatic increase in the utilization of the so-called mixed-motive method of proving employment discrimination claims. This increase is primarily the result of the U.S. Supreme Court's 2003 decision in *Desert Palace, Inc. v. Costa*, discussed *infra*.[129] Any discussion of the *Desert Palace* decision requires an initial discussion of the nature of the federal statutory remedies available in the employment discrimination context before analyzing how the burden of proof in such actions has been impacted by the decision.

Congress has enacted several important statutes prohibiting discrimination in the workplace. The most familiar of these is Title VII of the Civil Rights Act of 1964, which makes it an "unlawful employment practice for an employer . . . to discriminate against any individual . . . because of . . . race, color, religion, sex, or national origin."[130] Title VII requires the plaintiff to first file a charge of discrimination with the EEOC and give that agency the opportunity to assess the charge and decide whether to engage in reconciliation efforts with the employer or, less commonly, actually file suit against the employer itself. The intervention of the EEOC may prove helpful to plaintiffs who have been unable to obtain counsel, but, for the most part, plaintiffs have regarded Title VII's

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[129] Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

[130] 42 U.S.C. § 2000e-2(a)(1) (2000).

administrative requirements as more of a burden than a benefit.

While Title VII is clearly important, amendments contained in the 1991 Civil Rights Act mean that plaintiffs alleging race and related forms of discrimination (but not sex discrimination) will usually find greater recovery available under 42 U.S.C. § 1981, which prohibits such discrimination in the "mak[ing] and enforc[ing]" of contracts. It is submitted that the failure to recognize the benefits available under § 1981, as compared to Title VII, constitutes one of the greatest "litigation traps" for plaintiffs in employment discrimination cases. Indeed, it is not at all uncommon for federal district courts to encounter Title VII plaintiffs alleging race discrimination who, in confronting motions for summary judgment based upon their failure to comply with various Title VII requirements, seem quite unaware that they need only invoke § 1981 to prevail.

Although § 1981 actions had long been available to plaintiffs, the Supreme Court in *Patterson v. McLean Credit Union*[131] greatly limited the statute by holding that it only protected the initial formation of contracts and did not cover claims arising afterwards, such as hostile work environment and wrongful discharge claims. The 1991 Civil Rights Act overruled *Patterson* and extended § 1981 to include general condition of employment claims.[132] As an added bonus to plaintiffs, the Supreme Court held in the 2004 decision of *Jones v. R.R. Donnelley & Sons Company* that § 1981 claims made possible by the 1991 Act (that is, post-contract formation claims) are subject to a very generous four-year statute of limitations.[133]

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[131] Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

[132] *See* Evans v. City of Houston, 246 F.3d 344, 357 (5th Cir. 2001).

[133] Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004). Enacted by Congress in 1990, 28 U.S.C. § 1658 establishes a four-year statute of limitations for claims "arising under" federal statutes without a statute of limitations that were enacted after December 1, 1990. In *Donnelley*, the Supreme Court held that 28 U.S.C. § 1658 applies to new rights of action made possible by legislation passed after December 1, 1990, even if the legislation takes the form of an amendment to preexisting law. *Id.* at 381. This includes the 1991 Act's amendments to § 1981, discussed above. While a very generous four-year statute of limitations will thus apply to most § 1981 claims, even § 1981 claims by Mississippi plaintiffs which involve the initial formation of a contract will be subject to a three-year limitations period borrowed from Mississippi Code Ann. § 15-1-49. *See* Goodman v. Lukens Steel Co., 482 U.S. 656, 660 (1987) (holding that since § 1981 does

This makes the 180-day limitations period for Title VII claims in Mississippi appear positively draconian in comparison.[134] In addition, § 1981 plaintiffs are not required to exhaust administrative remedies before the EEOC, nor are they subject to the Title VII provision precluding suit against employers having fewer than fifteen employees.[135] Furthermore, unlike in Title VII cases, § 1981 plaintiffs in the Fifth Circuit may seek recovery against individual employees, at least where the employee is "essentially the same" as the employer for the purposes of the discriminatory conduct in question.[136]

In addition to the foregoing, plaintiffs will generally find greater recovery available under § 1981 than under Title VII. The U.S. Supreme Court has made it clear that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."[137] In the 1991 Civil Rights Act, Congress made compensatory and punitive damages available to Title VII disparate treatment plaintiffs for the first time, but these damages were made subject to caps that do not apply in § 1981 cases.[138] Specifically, Title VII now provides for a sliding scale of potential recovery of compensatory[139] and punitive

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not contain a statute of limitations, courts should therefore use the most analogous statute of limitations of the forum state).

[134] The Title VII limitations period for private-sector actions is set forth in 42 U.S.C. § 2000e-5(e)(1), which requires that a charge "shall be filed [with the EEOC] within one hundred and eighty days after the alleged unlawful employment practice occurred" unless the charge is also filed with a state or local agency, which extends the limitations period to 300 days. 40 U.S.C. § 2000e-5(e)(1) (2000). Mississippi is one of the few states which has no state or local agency comparable to the EEOC, and the 180-day limitations period accordingly applies in this state.

[135] *See* 42 U.S.C. § 2000e(b) (2000). The statutory formulation is actually somewhat more complex, requiring "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."

[136] *See* Foley v. Univ. of Houston Sys., 355 F.3d 333, 337-38 (5th Cir. 2003).

[137] Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 461 (1975).

[138] Prior to the 1991 Act, prevailing Title VII plaintiffs were limited to backpay and other "equitable" relief. *See* Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999). It should be noted that, even after the 1991 Act, compensatory and punitive damages are available only in Title VII disparate treatment and not disparate impact cases. *See Kolstad*, 527 U.S. at 547-48.

[139] Title VII defines "compensatory damages" as including "future pecuniary losses,

damages, ranging from $50,000 to $300,000, depending upon the number of employees employed by the defendant.

In light of the foregoing, § 1981 actions may be a very attractive option for plaintiffs alleging race discrimination, so much so that it is difficult to imagine why the typical plaintiff would opt to proceed under Title VII rather than § 1981. The main limitation upon § 1981 is that, to reiterate, it only applies to cases alleging race and certain related forms of discrimination. Plaintiffs alleging sex discrimination will be limited to proceeding under Title VII or, in cases involving disparate pay allegations, the Equal Pay Act.[140] Also, plaintiffs asserting claims of discrimination against local government entities will likely be better off proceeding under Title VII than under § 1981, since, at least in this circuit, the latter plaintiffs are subject to the same onerous limitations which apply in § 1983 cases.[141]

Turning to other important employment discrimination statutes, the Age Discrimination in Employment Act (ADEA)

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emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." *See* 42 U.S.C. § 1981a(b)(3).

[140] *See* 29 U.S.C. § 206(d) (2000). Plaintiffs alleging pay-based sex discrimination may also proceed under Title VII, but the U.S. Supreme Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Company*, 127 S. Ct. 2162 (2007) endorsed a rather stringent application of the Title VII statute of limitations in the disparate pay context. The Equal Pay Act has a two-year statute of limitations for non-wilful violations and a three-year statute of limitations for wilful violations which should prove much more attractive to Mississippi plaintiffs than Title VII's 180-day limitations period. *See* Ford v. Sharp, 758 F.2d 1018, 1023 (5th Cir. 1985); 29 U.S.C. § 255(a) (2000). In addition, EPA plaintiffs are not required to exhaust administrative remedies before the EEOC. It should be noted, however, that Title VII contains a broader prohibition against sex-based wage discrimination than the EPA, which is limited to claims alleging unequal pay among workers of different genders holding "equal" jobs. The available damages for EPA violations closely track the damages (including liquidated damages for wilful violations) available in ADEA claims. *See* 29 U.S.C. §§ 216, 217.

[141] The U.S. Supreme Court held in the 1989 decision of *Jett v. Dallas Independent School District*, 491 U.S. 701, 731 (1989), that § 1981 did not provide a separate cause of action against local government entities and that § 1981 plaintiffs must assert claims against state actors under § 1983. There was some question as to whether *Jett* had been overruled by a provision in the Civil Rights Act of 1991 which amended § 1981 to provide protection against "impairment under color of state law." *See* 42 U.S.C. § 1981(c). In *Oden v. Oktibbeha Co., Miss.*, 246 F.3d 458, 463-64 (5th Cir. 2001), however, the Fifth Circuit concluded that *Jett* remained good law in this circuit.

prohibits employers from discharging or otherwise discriminating against employees because of their advanced age (greater than forty years old).[142] As discussed below, recovery under the ADEA has been made somewhat difficult by certain Supreme Court decisions, but, where a right to recovery is established, ADEA plaintiffs may be entitled to generous damages, including statutory liquidated damages.[143] There are other federal discrimination and related worker rights statutes, such as the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA), which, while significant in their own right, arise (in the author's experience) much less frequently in Mississippi district court practice than the previously mentioned race, sex, and age discrimination claims.

While there thus exist several important federal statutes prohibiting employment discrimination, some variation on the familiar framework adopted by the U.S. Supreme Court in the 1973 decision of *McDonnell Douglas v. Green* has traditionally been used to allocate the burden of production under each of them at the summary judgment stage.[144] The *McDonnell Douglas* framework is of crucial importance in district court practice because it provides plaintiffs with a means of circumstantially proving their cases when they lack direct proof of discrimination. This is very significant, since it is rarely the case that employers are so careless as to provide plaintiffs with direct evidence of discrimination.

It should be emphasized that, contrary to common belief, the *McDonnell Douglas* framework is utilized solely at the summary judgment stage and is not to be applied at trial. Accordingly, the Fifth Circuit has held that "district courts should not frame jury instructions based upon the intricacies of the *McDonnell Douglas* burden shifting analysis" but "should instruct the jury to consider the ultimate question of whether a defendant took the adverse employment action against a

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[142] 29 U.S.C. § 621.

[143] 29 U.S.C. § 626(b); Hazen Paper Co. v. Biggins, 507 U.S. 604, 614-15 (1993).

[144] *See, e.g.*, Chaffin v. John H. Carter Co., 179 F.3d 316, 319 (5th Cir. 1999) (applying *McDonnell Douglas* framework to FMLA claims).

plaintiff because of her protected status."[145] Judging by proposed jury instructions submitted by litigants, many Mississippi attorneys are not aware of this admonition.

Regardless of the predicate federal discrimination statute involved, the *McDonnell Douglas* framework requires the plaintiff to first establish a *prima facie* case of discrimination in order to survive summary judgment. Establishing a *prima facie* case requires a showing that: (1) the plaintiff is a member of a protected group; (2) he was qualified for the position at issue; (3) he was discharged or suffered some other adverse employment action by the employer; and (4) he was replaced by someone outside his protected group or was treated less favorably than other similarly situated employees outside the protected group.[146]

The Fifth Circuit has acknowledged that establishing a *prima facie* case will ordinarily not be difficult,[147] and the law in this context has changed little in recent years. Assuming that a plaintiff is successful in establishing a *prima facie* case of discrimination, the employer must then rebut the presumption of discrimination that arises by articulating a legitimate, non-discriminatory reason for the adverse employment action.[148] It is at this stage that the *McDonnell Douglas* standard has recently been modified in a manner which should, at least in theory, make surviving summary judgment less difficult for many plaintiffs.

Until recently, the law in the Fifth Circuit and elsewhere was that, once the employer articulated a non-discriminatory reason for an adverse employment action, the employee's sole recourse was to present substantial evidence that the employer's stated reason was a pretext for discrimination. Demonstrating pretext usually involved showing that the employer's stated non-

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[145] Kanida v. Gulf Coast Med. Personnel LP, 363 F.3d 568, 576 (5th Cir. 2004).

[146] Rachid v. Jack In The Box, Inc., 376 F.3d 305, 309 (5th Cir. 2004).

[147] *See, e.g.*, Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 639 (5th Cir. 1985) (stating that to "establish a prima facie case, a plaintiff need only make a very minimal showing"). *See also* Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 41 (5th Cir. 1996).

[148] Auguster v. Vermilion Parish Sch. Bd., 249 F.3d 400, 402 (5th Cir. 2001).

discriminatory reason was false, and many discrimination cases have been dismissed at the summary judgment stage in the Fifth Circuit for plaintiffs' inability to make such a showing of pretext.

It is true that, since the U.S. Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*,[149] plaintiffs have had the additional option of proving discrimination under a so-called "mixed motive" theory.[150] *Price Waterhouse* broadened the causation element in Title VII cases to allow plaintiffs to prove a violation if they could demonstrate that discrimination was a factor, among other factors, for an adverse employment action and the employer failed to establish that it would have made the same decision absent any discrimination. The utility of the *Price Waterhouse* decision to plaintiffs was greatly reduced, however, by the fact that most appellate courts adopted Justice O'Connor's concurrence in *Price Waterhouse*, in which she opined that direct, rather than circumstantial, evidence of discrimination was required in mixed-motive cases.[151] Given the difficulties inherent in producing direct evidence of discrimination, the *Price Waterhouse* mixed-motive option proved to be of little relevance in most discrimination cases. Moreover, the mixed-motive option had no place within the *McDonnell Douglas* framework, which is, to reiterate, a means of *circumstantially* proving a case of discrimination.

In the Civil Rights Act of 1991, Congress codified the *Price Waterhouse* mixed-motive analysis, with some modifications. 42 U.S.C. § 2000e-2(m) provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin

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[149] Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989). It should be noted that the main opinion in *Price Waterhouse* was merely a plurality opinion, but the opinion, particularly as understood by Justice O'Conner's concurrence, nevertheless found wide application among circuit and district courts.

[150] The *Price Waterhouse* decision, in turn, had its origins in the 1977 decision of *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 284 (1977), which had applied a similar burden-shifting standard in the context of a First Amendment retaliation claim brought under 42 U.S.C. § 1983.

[151] *See, e.g.*, Mohr v. Dustrol, Inc., 306 F.3d 636, 640-41 (8th Cir. 2002); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999).

was a motivating factor for any employment practice, even though other factors also motivated the practice."[152] Once the plaintiff has made this showing, an employer cannot escape liability in Title VII cases. However, through the use of a limited affirmative defense, if an employer can demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor," then it may limit the plaintiff's damages to injunctive relief, declaratory relief, and attorney's fees and costs.[153] Nevertheless, even after the 1991 Act, the vast majority of federal circuits still adhered to Justice O'Connor's *Price Waterhouse* concurrence and required plaintiffs to produce direct evidence of discrimination in order to proceed under a mixed-motive theory.[154] The application of the mixed-motive analysis thus remained quite limited in its scope.

It was in this context that the U.S. Supreme Court's 2003 decision of *Desert Palace, Inc. v. Costa* was rendered.[155] In *Desert Palace*, the Supreme Court expressly rejected the "direct evidence" requirement in Title VII mixed-motive cases, holding that in order to qualify for a mixed-motive instruction, "a plaintiff need only present sufficient evidence [either direct or circumstantial] for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"[156] The Supreme Court based its decision in *Desert Palace* on the plain language of § 2000e-2(m), which, to reiterate, simply requires that a plaintiff "demonstrate[] that race, color, religion, sex, or national origin was a motivating factor for any employment practice," with no mention of any heightened standard of direct proof being required.[157]

Some circuit courts have sought to minimize the *Desert Palace* holding. In *Griffith v. City of Des Moines*, for example, the Eighth Circuit Court of Appeals concluded that "*Desert*

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[152] 42 U.S.C. §2000e2(m) (2000).

[153] 42 U.S.C. §§ 2000e-5(g)(2)(B) (2000).

[154] *See, e.g.*, *Mohr*, 306 F.3d at 640-641; *Fernandes*, 199 F.3d at 580.

[155] Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

[156] *Id.* at 101.

[157] 42 U.S.C. § 2000e-2(m) (2000).

Palace, a decision in which the Supreme Court decided only a mixed motive jury instruction issue, is an inherently unreliable basis for district courts to begin ignoring this circuit's controlling summary judgment precedents."[158] The Eighth Circuit thus made it clear that, in considering motions for summary judgment, district courts in that circuit should continue to apply the traditional *McDonnell Douglas* burden-shifting analysis without modifications. The Eleventh Circuit Court of Appeals similarly observed that "the fact that the Court did not even mention *McDonnell Douglas* in *Desert Palace* makes us even more reluctant to believe that *Desert Palace* should be understood to overrule that seminal precedent."[159] A subsequent Eleventh Circuit decision made clear that circuit's view that *Desert Palace* did not even serve to modify the *McDonnell Douglas* analysis, much less overrule it.[160]

In stark contrast to the aforementioned views, a few courts and commentators have concluded that *Desert Palace* impliedly overruled *McDonnell Douglas*, with one commentator even proclaiming *McDonnell Douglas* "dead as a doornail."[161] While this is likely going too far, it is submitted that the approach of the Eighth and Eleventh circuits in declining to modify the *McDonnell Douglas* framework in their circuits at all is problematic. *Desert Palace* is not merely a "jury instruction" case, as stated by the Eighth Circuit in *Griffith*, but, rather, establishes an entirely new avenue for plaintiffs to circumstantially prove a case of discrimination using a mixed-motive analysis. Barring a modification of the applicable *McDonnell Douglas* standards, a plaintiff who might otherwise have mixed-motive claims to prove will find his claims dismissed at the summary judgment stage if he is unable to demonstrate that his employer's stated non-discriminatory reasons are false

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[158] Griffith v. City of Des Moines, 387 F.3d 733, 735 (8th Cir. 2004).

[159] Cooper v. Southern Co., 390 F.3d 695, 725 n.17 (11th Cir. 2004).

[160] Burstein v. Emtel, Inc., 137 Fed. App'x 205, 209 n.8 (11th Cir. 2005).

[161] Jeffery A. Van Detta, "*Le Roi Est Mort; Vive Le Roi!*": *An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation Of Every Title VII Case After* Desert Palace, Inc. v. Costa *Into "Mixed-Motive" Case*, 52 DRAKE L. REV. 71, 72 (2003). *See also* Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987 (D. Minn. 2003).

or otherwise pretextual. As such, the approach of the Eighth and Eleventh circuits will almost inevitably prevent plaintiffs in those circuits from exercising the circumstantial mixed-motive option which the Supreme Court's decision in *Desert Palace* provided to them.

The Fifth Circuit has charted a different and, it is submitted, more appropriate course in assessing *Desert Palace*'s impact upon the *McDonnell Douglas* framework. In the 2004 decision of *Rachid v. Jack In The Box, Inc.*, the Fifth Circuit, joining the Fourth Circuit,[162] staked out a middle ground of sorts regarding *Desert Palace*'s impact upon applicable summary judgment standards.[163] The Fifth Circuit in *Rachid* initially concluded that *Desert Palace* did not affect the plaintiff's burden of proving a *prima facie* case or the defendant's task of then articulating a non-discriminatory reason for the adverse employment action, under *McDonnell Douglas*. The Court did, however, conclude that *Desert Palace* served to significantly expand a plaintiff's options for rebutting the defendant's stated non-discriminatory reason. That is, the Fifth Circuit modified the *McDonnell Douglas* framework to permit the employee to survive summary judgment by offering sufficient evidence to create a genuine issue of fact *either*

> (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); *or*
>
> (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is the plaintiff's protected characteristic (mixed-motive[s] alternative). If a plaintiff demonstrates that the protected characteristic was a motivating factor in the employment decision, it then falls to the defendant to prove "that the same adverse employment decision would have been made regardless of discriminatory animus. If the employer fails to carry this burden, plaintiff prevails."[164]

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[162] Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277 (4th Cir. 2004).

[163] Rachid v. Jack In The Box, Inc., 376 F.3d 305 (5th Cir. 2004).

[164] *Id.* at 312 (quoting Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1217 (5th Cir.

Clearly, it is the second option which marks such a significant departure from pre-existing law. While plaintiffs in the Fifth Circuit have traditionally focused on trying to prove that a defendant's stated non-discriminatory reason was false, *Rachid* provides them with the option of not contesting the truthfulness of the stated reason, but instead demonstrating that discrimination was also a motivating factor behind the adverse employment action. Without question, the latter option will present an easier burden for most plaintiffs to meet. It should be stressed, however, that plaintiffs proceeding under the mixed-motive option will still have to confront the "same decision defense," if it is raised by the defendant. As discussed in greater detail *infra*, the same decision defense appears to operate as a complete bar to recovery in non-Title VII discrimination and retaliation cases in the Fifth Circuit, but it represents a mere limitation upon damages in Title VII cases.

It should be noted that *Rachid* was an ADEA case, which has raised questions regarding the decision's applicability to other federal discrimination and retaliation actions. It seems implicit in *Rachid* that its holding applies to Title VII discrimination claims, and any doubt in this regard appears to have been removed by the 2006 decision of *Mayberry v. Mundy Contract Maintenance, Inc.* In *Mayberry*, a Fifth Circuit panel explicitly cited *Rachid* in applying the modified *McDonnell Douglas* framework to claims under both Title VII and under 42 U.S.C. § 1981.[165] In the 2007 decision of *Jenkins v. Methodist Hospitals of Dallas, Inc.*, the Fifth Circuit once again applied *Rachid* to an action brought under § 1981,[166] confirming once again the power of that statute for plaintiffs in this circuit. Similarly, in the November 2007 decision of *Pinkerton v. United States*, the Fifth Circuit, citing *Rachid*, held that a "motivating factor" causation standard applied to claims brought under the Americans with Disabilities Act.[167]

1995)); Richardson v. Monitronics Int'l, Inc., 434 F.3d 327, 333 (5th Cir. 2005).

[165] Mayberry v. Mundy Contract Maint., Inc., 197 F. App'x 314, 316 (5th Cir. 2006).

[166] Jenkins v. Methodist Hosps. of Dallas, Inc., 478 F.3d 255, 261 (5th Cir. 2007).

[167] Pinkerton v. United States, 508 F.3d 207, 214, (5th Cir. 2007).

In light of the foregoing, it seems reasonably clear that *Rachid* has resulted in a modification of the *McDonnell Douglas* burden-shifting framework in most (if not all) federal employment discrimination contexts in the Fifth Circuit. As discussed below, however, there is some uncertainty regarding whether *Rachid* applies in retaliation cases, since the Fifth Circuit has issued what are arguably contradictory holdings on this issue. Nevertheless, it should be apparent that, at least in theory, the *Rachid* holding makes it considerably easier for plaintiffs to survive summary judgment in discrimination cases. Some caution is in order, however.

While some early Fifth Circuit decisions applying *Rachid* have concluded that summary judgment was improper under a mixed-motive analysis, there are many more decisions affirming district court rulings granting summary judgment under the *Rachid* analysis. Indeed, a search of Fifth Circuit decisions that cited *Rachid* and actually applied its mixed-motive analysis reveals two decisions in which the Fifth Circuit reversed a district court grant of summary judgment[168] and twenty-one decisions in which the Fifth Circuit affirmed such grants of summary judgment.[169] In one additional decision, the Fifth

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[168] Burrell v. Dr. Pepper/Seven Up Bottling Group, Inc., 482 F.3d 408 (5th Cir. 2007); Machinchick v. PB Power, Inc., 398 F.3d 345, 355 (5th Cir. 2005). It should be noted that, in *Alvarado v. Texas Rangers*, 492 F.3d 605, 618 (5th Cir. 2007), the Fifth Circuit reversed the district court's grant of summary judgment in a Title VII sex discrimination claim based upon a conclusion that the employer had failed to provide a non-discriminatory reason, and the court did not apply the *Rachid* mixed-motive analysis.

[169] Earle v. Aramark Corp., 247 F. App'x 519 (5th Cir. 2007); Berquist v. Wash. Mut. Bank, 500 F.3d 344 (5th Cir. 2007); Crawford v. U.S. Dept. of Homeland Sec., 245 F. App'x 369; Barber v. Shaw Group, Inc., 243 F. App'x 810 (5th Cir. 2007); Lusk v. Gulf Coast Cmty. Servs. Ass'n, 244 F. App'x 544 (5th Cir. 2007); Collins v. Saia Motor Freight Lines, Inc., 144 F. App'x 368, 373 (5th Cir. 2005); Baker v. American Airlines, Inc., 430 F.3d 750, 754 (5th Cir. 2005); Moore v. Honeywell Int'l, Inc., 159 F. App'x 566, 568 (5th Cir. 2005); Shakir v. Prairie View A & M Univ., 178 F. App'x 361, 365 (5th Cir. 2006); Martin v. Bayland, Inc., 181 F. App'x 422, 426 (5th Cir. 2006); Staten v. New Palace Casino, L.L.C., 187 F. App'x 350, 362 (5th Cir. 2006); Phillips v. TXU Corp., 194 F. App'x 221, 227 (5th Cir. 2006); Mayberry v. Mundy Contract Maint., Inc., 197 F. App'x 314, 316 (5th Cir. 2006); Block v. Kelly Servs., Inc., 197 F. App'x 346, 349 (5th Cir. 2006); Dupre v. W. Baton Rouge Sch. Bd., 201 F. App'x 218, 219 (5th Cir. 2006); Myers v. Dallas Indep. Sch. Dist., 206 F. App'x 401, 402 (5th Cir. 2006); Jones v. Overnite Transp. Co., 212 F. App'x 268 (5th Cir. 2006); Stiner v. IBM Corp., No. 06-20588, 2007 WL 30837 (5th Cir.

Circuit remanded for a consideration of the plaintiff's mixed-motive theory by the district court, while being careful to emphasize that it did not intend to suggest that recovery was available under such a theory.[170]

The less-than-dramatic impact of *Desert Palace* and *Rachid* in the Fifth Circuit is not altogether surprising, since past experience supports a conclusion that changes in governing employment discrimination standards by the U.S. Supreme Court result in rather limited changes in actual results at the circuit court level. For example, in the 2000 decision of *Reeves v. Sanderson Plumbing Products, Inc.*, the U.S. Supreme Court, reversing the Fifth Circuit, clarified that a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, is sufficient to permit the trier of fact to conclude that the employer unlawfully discriminated.[171] Prior to *Reeves*, the Fifth Circuit had held that additional proof of discrimination above and beyond a showing of pretext (so-called "pretext plus") was required for a plaintiff to survive summary judgment.[172] The Supreme Court held in *Reeves* that this interpretation of the law was incorrect.[173]

Following *Reeves*, many commentators anticipated a dramatic increase in the number of discrimination cases which would survive summary judgment nationwide, but the reality proved to be otherwise, both in the Fifth Circuit and in other circuits.[174] The less-than-revolutionary impact of *Reeves* at the

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2007); Houk v. Peoploungers Inc., 214 F. App'x. 379 (5th Cir. 2007); Jenkins v. Methodist Hosps. of Dallas, Inc., 478 F.3d 255, 261 (5th Cir. 2007); Hamlett v. Gen. Motors Acceptance Corp., 218 F. App'x. 356 (5th Cir. 2007); Horak v. Glazer's Wholesale Drug Co., No. 06-10854, 2007 WL 713154 (5th Cir. 2007).

[170] Taylor v. Peerless Indus., Inc., 211 F. App'x 248, 250 (5th Cir. 2006).

[171] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146 (2000).

[172] *See, e.g., id.* at 692; Marcantel v. State of La., Dept. of Transp. & Dev., 37 F.3d 197 (5th Cir. 1994).

[173] *See Reeves*, 530 U.S. at 146-47.

[174] Matthew R. Scott & Russell D. Chapman, Reeves v. Sanderson Plumbing Products*: The Emperor Has No Clothes—Pretext Plus is Alive and Kicking*, 37 ST. MARY'S L.J. 179, 196 (2005) (observing that "Reeves is simply not the watershed case many have proclaimed . . . it to be"); Tamara Loomis, *Employment Bias: After 'Reeves,' Little Has Changed in the Circuit*, N.Y. L.J., July 5, 2001, at 5 (discussing minimal impact of *Reeves* in the Second Circuit).

Fifth Circuit can be observed in the 2000 decision of *Rubinstein* v. *Administrators of the Tulane Education Fund*, where the Fifth Circuit observed that "[w]hile we are mindful of the Supreme Court's recent admonition [in *Reeves*] . . . discrimination suits still require evidence of discrimination."[175] Except in the rare case where certiorari is granted, it is individual Fifth Circuit judges, rather than U.S. Supreme Court Justices, who decide whether Fifth Circuit plaintiffs have presented sufficient evidence of discrimination to survive summary judgment in a particular case. Early indications are that *Desert Palace*, much like *Reeves* before it, has not greatly altered the views of Fifth Circuit judges in this regard.

It can be argued that excessive weight should not be placed upon these early Fifth Circuit decisions, since *Rachid*'s greatest impact will likely be felt at the district court level, in the form of more denials of summary judgment motions. Denials of summary judgment motions are appealed much less frequently than orders granting summary judgment, due to their procedural posture.[176] It should also be noted that, while *Reeves* merely clarified how pre-existing *McDonnell Douglas* standards should be applied, *Desert Palace/Rachid* articulated new standards for district courts to apply in considering summary judgment motions. *Desert Palace* therefore appears to be the more significant decision.

While *Rachid* will likely have a significant impact at the district court level, its impact in Mississippi to date has almost certainly been less than plaintiffs would have hoped. A search of Mississippi district court opinions revealed twenty-one orders granting motions for summary judgment under the new standards set forth in *Rachid*[177] and seven orders denying

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[175] Rubinstein v. Adm'rs of the Tulane Educ. Fund, 218 F.3d 392, 400 (5th Cir. 2000).

[176] Indeed, in the writer's experience, discrimination cases very often settle following the denial of a summary judgment motion by a district court, which obviously precludes appellate review. Of those cases that do not settle, any denial of a summary judgment motion is often mooted for appellate review purposes by a jury verdict in favor of the defendant. Even in cases involving a verdict for the plaintiff, an appellate court may be reluctant to disagree with both the district judge and the jury by concluding that the plaintiff's claims lack merit as a matter of law.

[177] Rogers v. Operations Techs., Inc., 2007 WL 2301191 (S.D. Miss. Aug. 12, 2007);

motions for summary judgment under these standards.[178] It should be noted that some of the aforementioned cases were dismissed due to a plaintiff's failure to establish a prima facie case or due to some other failing unrelated to the application of the holding in *Rachid*. Nevertheless, it seems fair to conclude that, while plaintiffs have fared somewhat better at the district court level than they have at the Fifth Circuit, the early results are not particularly encouraging for plaintiffs at either level. As discussed previously, however, *Rachid* does appear to represent a more faithful application of *Desert Palace* than the approach adopted by certain other circuits, and it is perhaps unrealistic to expect a revolutionary change in summary judgment practices based upon a single Supreme Court decision, however important it may be.

Peters v. Cumulus Fibers, Inc., 2007 WL 2071785 (N.D. Miss. July 18, 2007); Clinton v. Datascope Corp., 2007 WL 2012438 (N.D. Miss. July 6, 2007); Taylor v. Cooper Tire & Rubber Co., 2007 WL 1485881 (N.D. Miss. May 18, 2007), *aff'd*, 2007 WL 3390948 (5th Cir. Nov. 15, 2007); Seldon v. Grenada Lake Med. Ctr., 2007 WL 1098483 (N.D. Miss. Apr. 9, 2007); Yates v. Johanns, 2007 WL 844694 (N.D. Miss. Mar. 19, 2007); Pauling v. Ocean Springs Hosp., 2007 WL 541701 (S.D. Miss. Feb. 16, 2007); Rikabi v. Nicholson, 2006 WL 3337506 (S.D. Miss. Nov. 16, 2006), *rev'd*, 2008 WL 190045 (5th Cir. Jan. 23, 2007); McDaniel v. Johanns, 2006 WL 2794326 (N.D. Miss. Sept. 27, 2006); Kimbrough v. Harrison County, 2006 WL 2516521 (S.D. Miss. Aug. 29, 2006); Blakely v. First Miss. Fed. Credit Union, 2006 WL 2243203 (S.D. Miss. Aug. 4, 2006); Jones v. Bellsouth, 2006 WL 1994881 (S.D. Miss. July 14, 2006); Williams v. Weems Cmty. Mental Health Ctr., 2006 WL 1666280 (S.D. Miss. June 13, 2006); Jackson v. Principi, 2006 WL 1307958 (S.D. Miss. May 11, 2006); Staton v. Med. Practice Solutions, Inc., 2006 WL 1028871 (S.D. Miss. Apr. 13, 2006); Houk v. PeopLoungers, Inc., 2006 WL 1029996 (N.D. Miss. Apr. 13, 2006), *aff'd*, 214 F. App'x 379 (5th Cir. 2007); Montgomery v. Potter, 2006 WL 559240 (N.D. Miss. Mar. 6, 2006); Calvert v. Eljer Plumbingware, Inc., 2005 WL 1683780 (N.D. Miss. July 19, 2005); Robbins v. Cleveland Sch. Dist., 2005 WL 1312617 (N.D. Miss. May 31, 2005); Levy v. Baptist Memorial Hosp.-North Miss., 2005 WL 1221827 (N.D. Miss. May 23, 2005); Moore v. McCullough, 351 F. Supp. 2d 536 (N.D. Miss. 2005).

[178] Johnson v. United Furniture Indus., 2007 WL 1501032 (N.D. Miss. May 21, 2007); Dilworth v. Continental Const. Co., Inc., 2007 WL 1140652 (N.D. Miss. Apr. 16, 2007); Williams v. Lowe's Home Ctrs., Inc., 2007 WL 391567 (S.D. Miss. Jan. 31, 2007); Snapp v. Ruan Transport Corp., 2006 WL 2455922 (N.D. Miss. Aug. 22,. 2006); Penman v. Snow, 2006 WL 1195336 (S.D. Miss. May 4, 2006); Jones v. Williams Sonoma, Inc., 2005 WL 3289361 (N.D. Miss. Dec. 5, 2005); Warren v. Terex Corp., 328 F. Supp. 2d 641 (N.D. Miss. 2004).

Areas of Uncertainty Relating to Rachid

While the general approach adopted by the Fifth Circuit in *Rachid* appears sound, the author would note three issues of uncertainty regarding the current application of the approach in this circuit.

1. Does the *Rachid* mixed-motive option apply in retaliation cases?

Of all the uncertainties surrounding *Rachid*'s application, none is potentially so vexing to district judges as the uncertainties surrounding the application of the mixed-motive option in retaliation cases. There is a lack of clarity among Fifth Circuit decisions on this issue, which will make it difficult for district judges to know with any confidence what basic standard applies in retaliation cases. It appears likely, but is not certain, that *Rachid* applies in retaliation cases, assuming that the plaintiff makes it clear sufficiently early that he is seeking to recover under a mixed-motive theory. However, certain language in a recent Fifth Circuit decision may lead district courts, and possibly other Fifth Circuit panels, to conclude otherwise.

In the 2005 decision of *Richardson v. Monitronics International, Inc.*, the Fifth Circuit applied *Rachid* to an FMLA retaliation claim, holding that "*Rachid* is the law of this circuit, and, even though it addresses a different anti-discrimination statute, consistency requires that we endorse the mixed-motive framework in appropriate FMLA retaliation cases."[179] While *Richardson* appeared to settle the issue, a different Fifth Circuit panel wrote in the June 2006 decision of *Staten v. New Palace Casino,* that "[t]his circuit has not extended the holdings of *Desert Palace* or *Rachid*, both of which concern discrimination claims, to Title VII retaliation claims."[180] Although this was, strictly speaking, true, the Fifth Circuit in *Richardson* had

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[179] Richardson v. Monitronics Int'l, Inc., 434 F.3d 327, 334 (5th Cir. 2005).

[180] Staten v. New Palace Casino, L.L.C., 187 F. App'x 350, at *9 (5th Cir. 2006) (citing Septimus v. Univ. of Houston, 399 F.3d 601, 607 n.7 (5th Cir. 2005)).

clearly applied the *Rachid* holding to an FMLA retaliation claim, and it seems unlikely that the Fifth Circuit would apply differing standards to FMLA and Title VII retaliation claims.

Any doubt regarding *Rachid*'s application to retaliation actions seemed to have been removed by the Fifth Circuit's September 2006 decision in *Block v. Kelly Services, Inc.*, where the court clearly cited and applied the *Rachid* holding in the context of a Title VII retaliation claim.[181] This apparent clarity lasted until March 2007, when the Fifth Circuit issued the opinion of *Strong v. University HealthCare System.*[182] In *Strong*, the Fifth Circuit, citing the 2005 decision of *Septimus v. University of Houston,* wrote that "[w]e think our decision in *Septimus* leaves no doubt that the but for standard controls: 'The proper standard of proof . . . [for] a Title VII retaliation claim is that the adverse employment action . . . would not have occurred *'but for' [the] protected conduct.*'"[183] While the Fifth Circuit had, in fact, held in *Septimus* that the district court's granting of a mixed-motive instruction was reversible error, the Court emphasized in that case that the parties had "litigated and tried" the case as a single-motive pretext case.[184] Accordingly, *Septimus* was seemingly limited to cases where the plaintiff elected not to (or simply neglected to) proceed under a mixed-motive theory. It appears that this is the case with *Strong* as well, since the opinion specifically notes that "[b]ecause Strong's retaliation claims are based on a pretext theory, our analysis is governed by the well-known *McDonnell Douglas* test and its burden-shifting framework."[185] This conclusion is strengthened by the May 2007 decision of *Campbell v. England*, where the Fifth Circuit noted *Septimus*'s

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[181] Block v. Kelly Services, Inc., 197 F. App'x 346, at *2 (5th Cir. 2006) (holding that, upon the establishment of a prima facie case, "the burden returns to [the defendant] to prove the proffered reason was a pretext, or, although not pretext, was only one of the reasons she was fired, another being her protected activity" and citing *Rachid* for this proposition).

[182] Strong v. Univ. HealthCare Sys., L.L.C., 482 F.3d 802 (5th Cir. 2007).

[183] *Id.* at 806 (citing *Septimus*, 399 F.3d at 608).

[184] *Septimus*, 399 F.3d at 607, n.7.

[185] *Strong*, 482 F.3d at 805.

holding that a "but for" causation standard applied but emphasized that the panel in that case did not "consider[] the effect of *Desert Palace* and *Rachid* because the case was litigated and tried as a pretext case."[186]

It thus appears that the *Septimus/Strong* holdings requiring a "but for" causation standard in retaliation cases may only apply in cases where the plaintiff fails to timely raise mixed-motive arguments. Assuming this is the case, however, *Strong* may nevertheless give rise to confusion, since the actual holding of the case, quoted above, does not make it clear that it is limited to cases where the plaintiff fails to timely raise mixed-motive arguments. It will be very easy for district courts and future Fifth Circuit panels to overlook the qualification in *Strong* that the plaintiff had proceeded solely under a pretext theory, and it seems likely that many district courts will simply follow *Strong*'s rather strongly-worded holding that a "but for" standard applies in Title VII retaliation cases.

In a 2007 order, Judge Mills took note of the confusion arising from this case law, writing that "[i]f the *Rachid* mixed-motive option is available to plaintiffs in retaliation cases—and *Block* and *Richardson* indicate that it is—then there is a great potential for confusion regarding the circumstances in which a 'but for' standard should nevertheless be applicable in such cases."[187] Judge Mills had previously considered this issue, predicting in 2004 that the Fifth Circuit would apply *Rachid* to retaliation claims and further concluding that a "but for" causation standard was inconsistent with a retaliation claim brought under a mixed-motive theory.[188]

Subsequently, several other district courts in the Fifth Circuit also applied *Rachid* to retaliation cases,[189] and their

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[186] Campbell v. England, 234 F. App'x 183 (5th Cir. 2007). The Fifth Circuit in *Campbell* also reiterated that "[t]his circuit has not yet considered whether [*Desert Palace* and *Rachid*] should be extended to Title VII retaliation cases," without mentioning *Richardson*'s holding that *Rachid* applied in FMLA retaliation cases. *Id.* at *2.

[187] Holland v. NEMCC, No. 1:06CV33, docket entry 39 (N.D. Miss. June 5, 2007).

[188] Warren v. Terex Corp., 328 F. Supp. 2d 641, 646 (N.D. Miss. 2004).

[189] Bergen v. Cont'l Cas. Co., 368 F. Supp. 2d 567, 572-72 (N.D. Tex. 2005); Cones v. Duke Energy Corp., 367 F. Supp. 2d 1092, 1100 (S.D. Tex. 2005); Block v. Kelly Servs.,

decision to do so originally seemed to have been borne out by the Fifth Circuit's opinions in *Richardson* and *Block*. Their decision to do so likewise appears to be supported by the November 2007 decision of *Pinkerton v. United States*, where the Fifth Circuit held that a "motivating factor" causation standard applied to ADA claims.[190] While this holding was apparently limited to ADA *discrimination* claims, certain language in the opinion appears to suggest that the Fifth Circuit would reach the same conclusion with regard to ADA retaliation claims.[191] Thus, there is an increasing volume of Fifth Circuit case law which suggests that *Rachid* does, in fact, apply to retaliation claims. In light of *Strong*, however, the governing causation standards in retaliation cases will likely seem unclear to many litigants and judges, even though Fifth Circuit case law on this issue is, to reiterate, arguably consistent upon closer inspection.[192] Given the importance of this issue, it may be hoped that the Fifth Circuit will issue clearer guidelines regarding exactly what causation standards apply in retaliation cases where a plaintiff timely asserts a mixed-motive theory of recovery.

2. How should the "same decision" defense be applied in discrimination cases following *Rachid?*

Another area of uncertainty regarding the application of the

Inc., 2005 WL 2647970, at *4 (S.D. Tex. Oct. 14, 2005), *aff'd*, 197 F. App'x 346 (5th Cir. 2006); Thomas v. Willie G's Post Oak, Inc., 2006 WL 1117959, at *9 (S.D. Tex. Apr. 25, 2006).

[190] Pinkerton v. United States, 508 F.3d 207, 213 (5th Cir. 2007).

[191] That is, the Fifth Circuit framed the issue in *Pinkerton* as being whether "discriminatory and retaliatory conduct is proscribed" by the ADA only in single-motive cases, and the court specifically cited *Richardson* for its holding that the mixed-motive framework is applicable to FMLA retaliation claims. *Pinkerton*, 508 F.3d at 212.

[192] One way in which district courts could arguably mesh the "but for" causation standard into the mixed-motive framework is to instruct the jury that a "but for" causation standard applies but to emphasize that, if the plaintiff demonstrates that retaliation was a motivating factor behind the adverse employment action, it is the defendant who has the burden of proving that it would have made the same decision even absent retaliation and, thus, that the "but for" standard is not met. While this approach might be less than satisfying intellectually, it would arguably walk the tightrope of Fifth Circuit authority on this issue as well as can be expected, pending clarification of the law in this context.

mixed-motive option in the Fifth Circuit involves the so-called "same decision defense," established by the Supreme Court in the *Price Waterhouse* decision and later codified (in somewhat different form) in Title VII cases as part of the Civil Rights Act of 1991.[193] It seems reasonably clear that the application of the defense in the Fifth Circuit will differ depending upon whether an action is brought pursuant to Title VII or some other employment discrimination statute such as the ADEA. In Title VII cases, modifications set forth in the 1991 Civil Rights Act clearly provide that establishing the same decision defense merely serves to *limit*, rather than eliminate, an employer's potential liability, specifically to injunctive, declaratory relief, and attorney's fees and costs.[194] However, it appears that the Fifth Circuit considers the same decision defense to remain a complete bar to recovery in non-Title VII employment discrimination and retaliation cases, as it was under the pre-1991 *Price Waterhouse* scheme.

For example, in the 2005 decision of *Machinchick v. PB Power*, an ADEA case, the Fifth Circuit cited *Rachid* for the proposition that:

> In a mixed-motive case involving an employment decision based on a "mixture of legitimate and illegitimate motives," the plaintiff need only prove that the illegitimate motive was a motivating factor in the decision. Once the plaintiff meets this burden, the employer may seek to avoid liability by proving that it would have made the same employment decision in the absence of the illegitimate discriminatory motive.[195]

The Fifth Circuit in *Machinchick* thus wrote that an employer may "avoid liability" by establishing the same decision defense, apparently contemplating the defense as a complete one in the ADEA context.

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[193] 42 U.S.C. § 2000e-2(m) (2006); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Dukes v. Wal-Mart, Inc., 474 F.3d 1214, 1240 (9th Cir. 2007) (referring to "same decision defense"), *withdrawn*, 509 F.3d 1168 (9th Cir. 2007).

[194] 42 U.S.C. §§ 2000e-5(g)(2)(B).

[195] Machinchick v. PB Power, Inc., 398 F.3d 345, 355 (5th Cir. 2005) (citations omitted).

While this portion of *Machinchick* appears to be dicta, other post-*Rachid* decisions have actually applied the same-decision defense as a complete bar to recovery at the summary judgment stage. In *Richardson*, an FMLA retaliation case, the Fifth Circuit initially concluded that the district court, which granted summary judgment, had erroneously failed to apply the *Rachid* mixed-motive framework.[196] The Fifth Circuit further concluded that there were fact issues as to whether retaliation was a motivating factor in the plaintiff's termination.[197] However, the Fifth Circuit nevertheless concluded that the district court properly granted summary judgment, since "the only reasonable conclusion a jury could make is that [the employer] would have fired [the plaintiff] with or without retaliatory animus."[198] The Fifth Circuit reached a similar result in the 2007 decision of *Lusk v. Gulf Coast Community Services Association*, an ADEA case, agreeing with the district court that the defendant would have made the same decision even absent age discrimination and thus affirming the grant of summary judgment.[199]

The Fifth Circuit's apparent view of the same decision defense as a complete bar to recovery in non-Title VII cases is supported by relevant statutory language. However, it arguably would have been preferable for the Court to stress that this approach does not apply in Title VII cases, lest there be confusion on this issue. Moreover, even in non-Title VII cases, the Fifth Circuit's willingness to affirm summary judgments on the basis of the same decision defense is arguably somewhat controversial. At the summary judgment stage, the court is required to consider the evidence in the light most favorable to the plaintiff, as the non-moving party. Moreover, the same decision defense only becomes relevant after a plaintiff has first been able to establish fact issues that discrimination was a motivating factor behind an adverse employment action. That being the case, it is arguably only in unusual cases that a court

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[196] Richardson v. Monitronics Int'l, Inc., 434 F.3d 327, 335 (5th Cir. 2005).

[197] *Id.*

[198] *Id.* (emphasis removed).

[199] Lusk v. Gulf Coast Cmty. Servs. Ass'n., 244 F. App'x 544 (5th Cir. 2007).

should find at the summary judgment stage that, the plaintiff's evidence of discrimination as a motivating factor notwithstanding, the defendant's evidence on the same decision defense is so compelling that no reasonable juror could disbelieve it. It is unclear whether the Fifth Circuit agrees with this proposition, however, and it may develop that, at least in non-Title VII cases, a broad application of the same decision defense at the summary judgment stage will erode many of the benefits which plaintiffs would otherwise obtain from *Rachid*.

3. How and when must the plaintiff elect to proceed under a mixed-motive theory?

A third unsettled issue regarding *Rachid*'s application involves what steps a plaintiff must take to avail himself of the circumstantial mixed-motive option and when these steps must be taken. The Ninth Circuit has observed that the "significance of the distinction between 'single motive' and 'mixed motive' is most often seen towards the end of a trial when the district court must instruct the jury."[200] Accordingly, the Ninth Circuit would presumably not require a plaintiff to decide whether to proceed under the mixed-motive option until shortly before the jury instruction stage.

While the Fifth Circuit has not expressly stated when plaintiffs are required to raise mixed-motive arguments, it appears that they are required to do so much sooner than in the Ninth Circuit. Indeed, in *Strong*, discussed *supra*, the Fifth Circuit applied a considerably more stringent "but for" causation standard in reviewing a district court's dismissal on summary judgment, since the plaintiff's retaliation claims were based solely on a pretext theory.[201] Presumably, the plaintiff in *Strong* could have had her claims considered under a more lenient "motivating factor" causation standard if she had made it clear that she was seeking recovery under a mixed-motive theory.

The panel in *Strong* based its holding on the 2005 *Septimus* decision, where, as discussed previously, the Fifth Circuit

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[200] Stegall v. Citadel Broad. Co., 350 F.3d 1061, 1067 (9th Cir. 2003).

[201] Strong v. Univ. HealthCare System, L.L.C., 482 F.3d 802, 805-06 (5th Cir. 2007).

reversed the district court's grant of a mixed-motive instruction in a retaliation case which the parties had "litigated and tried" as a single-motive pretext case.[202] In *Campbell v. England*, the Fifth Circuit likewise concluded that the holding in *Rachid* was not before it since "neither party has raised it, and, in any event, this case was tried as a pretext case and the jury was instructed as to 'but for' causation on the retaliation claim."[203]

While it thus seems clear that a plaintiff may lose the right to make mixed-motive arguments on appeal if he fails to raise the arguments at the district court level, it remains unclear exactly when these arguments must first be raised. It *appears*, in light of *Strong*, that the plaintiff must raise any mixed-motive arguments in response to a motion for summary judgment in order to have the district court (and the Fifth Circuit on appeal) consider the arguments at that time. This presupposes, of course, that the plaintiff actually *wants* to utilize the mixed-motive option in a particular case, although it should not be assumed that this will always be the case.[204]

Assuming that the plaintiff does fail to raise mixed-motive arguments at the summary judgment stage, and the motion for summary judgment is denied, it appears that the plaintiff may still elect to proceed under a mixed-motive theory at trial. In at least one decision, a district court raised this issue on its own motion, directing that the plaintiff make a specific election in this regard. In *Holland v. NEMCC*, Judge Mills entered an order shortly before trial directing that the plaintiff state whether she wished to proceed under a mixed-motive theory at trial.[205] In so ordering, Judge Mills noted that the plaintiff had

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[202] Septimus v. Univ. of Houston, 399 F.3d 601, 607 n.7 (5th Cir. 2005).

[203] Campbell v. England, 234 F. App'x 183 (5th Cir. 2007).

[204] Some plaintiffs, particularly those who possess strong evidence of the falsity of the defendant's stated non-discriminatory reason, may prefer the "all or nothing" approach of the pretext option. While the mixed-motive option makes it easier for the plaintiff to secure *some* recovery, it also raises the possibility that the court or jury will seek to "split the baby" by finding that discrimination was a motivating factor but that the same decision defense was nevertheless established. This would, of course, result in a limited award of attorneys fees, etc. in Title VII cases, but no recovery at all in non-Title VII cases.

[205] Holland v. NEMCC, No. 1:06cv33, docket entry 39 (N.D. Miss. June 5, 2007).

failed to raise mixed-motive arguments at the summary judgment stage, thus leaving it unclear whether the jury instructions in that case should be based on a pretext theory, mixed-motive theory, or both.[206] In response to the court's order, the plaintiff in *Holland* made it clear that she wished to proceed under both pretext and mixed-motive theories at trial.[207] Plaintiffs should certainly not assume that a district court will raise this issue on its own motion, however; it is highly advisable for them to do so themselves.

It should also be noted that the Fifth Circuit held in the August 2007 decision of *Guerra v. North East Independent School District* that, even though the case had been tried as a pretext case, the use of a "motivating factor" causation standard in a jury instruction was not plain error.[208] The jury in *Guerra* rendered a verdict for the defendant, however, and the precedential value of the decision is likely limited by this fact. That is, in the event that the jury had returned a verdict for the plaintiff, it seems likely that the improper use of a mixed-motive causation standard would have been held to be reversible error in *Guerra*. It is also significant that the Fifth Circuit acknowledged in *Guerra* that the use of a mixed-motive instruction in a pretext case was, in fact, improper, with the only issue being whether it constituted reversible error.[209] *Guerra* thus confirms that plaintiffs wishing to proceed under a mixed-motive theory should make clear their intention to do so, preferably at an early stage of the litigation.

4. What impact will *Rachid* have upon the Fifth Circuit's "stray remarks" jurisprudence?

One of the most commonly confronted issues in employment discrimination litigation involves the admissibility and weight to be given to workplace remarks which allegedly demonstrate discriminatory animus against the plaintiff. Courts nationwide

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[206] *Id.*

[207] *Id.*, docket entry 40.

[208] Guerra v. North East Indep. Sch. Dist., 496 F.3d 415, 418 (5th Cir. 2007).

[209] *Id.*

have sought to draw a distinction between remarks which directly establish a connection between any discriminatory animus and an adverse employment action and "stray remarks"—that is, isolated remarks which are unconnected to any employment decision. Courts have generally held that stray remarks do not, by themselves, constitute sufficient evidence to sustain an employment discrimination claim.

The Fifth Circuit's "stray remarks" jurisprudence was in a state of some uncertainty even before *Rachid*, and these uncertainties have only been increased by the decision. Originally, the Fifth Circuit applied the so-called *CSC Logic* test, set forth in the 1996 decision of *Brown v. CSC Logic, Inc.*, in analyzing the weight to be given to allegedly discriminatory remarks. Under this test, workplace

> remarks may serve as sufficient evidence of [] discrimination if the offered comments are: 1) age related [i.e. related to the protected characteristic in question]; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue.[210]

The validity of the *CSC Logic* test was cast into serious doubt by the U.S. Supreme Court's 2000 decision of *Reeves v. Sanderson Plumbing Products, Inc.*[211] As noted previously, the Supreme Court in *Reeves* clarified that a "plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, [is sufficient to] permit the trier of fact to conclude that the employer unlawfully discriminated," with no further evidence of discrimination required.[212] The Supreme Court in *Reeves* specifically criticized the Fifth Circuit's use of the *CSC Logic* test to reject the age-related comments introduced by the plaintiff in that case. That is, the Supreme Court in *Reeves* wrote that the Fifth Circuit had improperly discounted the relevance of "potentially damning" age-related comments merely because they were "not made in

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[210] Brown v. CSC Logic, Inc., 82 F.3d 651, 655 (5th Cir. 1996).

[211] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146 (2000).

[212] *Id.* at 148.

the direct context of [the plaintiff's] termination."[213] Following the Supreme Court's reprimand in *Reeves*, the Fifth Circuit concluded that it should continue to apply the *CSC Logic* test in discrimination cases, but only when a remark is "presented as direct evidence of discrimination apart from the *McDonnell Douglas* framework."[214]

Certain district courts have expressed confusion in attempting to interpret the Fifth Circuit's post-*Reeves* stray remarks jurisprudence. In the 2007 decision of *Lewis v. Home Depot U.S.A., Inc.*, a Texas district judge wrote, following a review of Fifth Circuit authority, that:

> The standard the Fifth Circuit employs for "stray remarks" has been less than clear at times. In some cases, the Fifth Circuit has applied the so-called *CSC Logic* test only when comments were offered as evidence of direct discrimination and rejected its application to cases in which comments were offered as circumstantial evidence; at other times, the Fifth Circuit has applied the *CSC Logic* test in analyzing circumstantial evidence.[215]

While there are arguably inconsistencies in the case law on this issue, it seems reasonably clear that, post-*Reeves*, the proper standard in the Fifth Circuit for analyzing workplace remarks in *circumstantial* discrimination cases is the two-part test set forth in the 2003 decision of *Laxton v. Gap, Inc.* This standard provides that:

> [A] plaintiff wishing to use workplace remarks as circumstantial evidence of employment discrimination need only prove that the remarks demonstrate (1) discriminatory animus (2) on the part of a person that is either primarily

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[213] *Id.* at 152.

[214] Laxton v. Gap, Inc., 333 F.3d 572, 583 n.4 (5th Cir. 2003). *See also* Russell v. McKinney Hosp. Venture, 235 F.3d 219, 226 (5th Cir. 2000) (noting that "[t]he remarks at issue in this case are certainly appropriate additional circumstantial evidence of age discrimination because their content indicates age animus and [the defendant] was primarily responsible for [the plaintiff's] termination").

[215] Lewis v. Home Depot U.S.A., Inc., 2007 WL 1100422, at *7 (W.D. Tex. Apr. 10, 2007) (discussing Jenkins v. Methodist Hosp. of Dallas, Inc., 478 F.3d 255, 261-62 (5th Cir. 2007)).

> responsible for the challenged employment action or by a person with influence or leverage over the relevant decision maker.[216]

The most important distinction between this test and the *CSC Logic* test appears to be the omission of the requirement that the statement be proximate in time to the adverse employment action. The *Laxton* test has been applied in several cases in recent years[217] and appears to represent the Fifth Circuit law which will be applicable in most cases.

The more stringent *CSC Logic* test may appear to be something of a relic in light of *Reeves* and *Rachid*, but there may still be cases where a plaintiff will wish to proceed under the older standard. That is, if the plaintiff is able to meet the added requirements of the *CSC Logic* test, then he will be able to use the workplace remarks in question as direct evidence of discrimination and potentially survive summary judgment without the burden of meeting the requirements of the *McDonnell Douglas* framework. As such, the *CSC Logic* standard is more challenging for plaintiffs to meet but provides greater benefits in the event that it is met.

An additional wrinkle on the stray remarks issue is provided by Fifth Circuit authority, which cautions that, even after *Reeves*, stray remarks cannot be the only evidence of pretext.[218] If followed in future cases, this holding will make the availability of the *Rachid* mixed-motive option of even greater importance to plaintiffs. That is, remarks which meet the *Laxton* test will, presumably, often suffice to meet a plaintiff's burden of demonstrating fact issues regarding discrimination as a *motivating factor*, even if they are insufficient to demonstrate pretext. Assuming that the remarks do suffice to establish fact issues in this regard, it would then fall to the employer to

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[216] *Id.* (citing Laxton v. Gap, Inc., 333 F.3d 572, 583 (5th Cir. 2003)).

[217] *See, e.g.*, Berquist v. Washington Mut. Bank, 500 F.3d 344, 351 (5th Cir. 2007); Phillips v. TXU Corp., 194 F. App'x 221, 227 (5th Cir. 2006); Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 581 (5th Cir. 2004).

[218] *Phillips*, 194 F. App'x at 227-28 ("After *Reeves* . . . so long as remarks are not the only evidence of pretext, they are probative of discriminatory intent.") (quoting Palasota v. Haggar Clothing Co., 342 F.3d 569, 577 (5th Cir. 2003))).

establish the same decision defense to either escape liability or, in Title VII cases, limit the damages potentially recoverable by the plaintiff.

Having attempted to clarify the Fifth Circuit's stray remarks jurisprudence, it should be emphasized that, as with other evidentiary issues, legal standards are often less important than factual context. The aforementioned standards serve to assist the district court in evaluating the admissibility of workplace statements and are thus of considerable significance. It seems likely, however, that, in many cases, the most important factor will be the district court's common-sensical evaluation of how reliable the statements in question are as evidence of intentional discrimination. Thus, while there have been important changes in the applicable legal standards relating to stray remarks in recent years, it seems likely that the basic inquiry conducted by district courts on this issue will not be dramatically altered.

B. Trends in Title VII Retaliation Cases: Impact of Burlington Northern & Santa Fe Railway Company v. White

Retaliation claims arise out of a separate provision in Title VII which makes it an "unlawful employment practice" for an employer to "discriminate" against an employee because that employee "has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[219] Other federal discrimination statutes contain similar anti-retaliation provisions, including the ADEA,[220] the FMLA,[221] and the ADA.[222] The issue of whether retaliation claims may be brought under 42 U.S.C. § 1981 is, as of the writing of this article, before the U.S. Supreme Court on writ of

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[219] 42 U.S.C. § 2000e-3(a) (2006).

[220] 29 U.S.C. § 623(d).

[221] 29 U.S.C. § 2615(a)(2).

[222] 42 U.S.C. § 12203(a).

certiorari.[223]

At the summary judgment stage, the Fifth Circuit has applied the same *McDonnell Douglas* framework to retaliation claims brought under each of these statutes.[224] A plaintiff in this circuit may establish a prima facie case of retaliation by showing that: (1) he participated in an activity protected by (Title VII, the ADEA, FMLA, etc); (2) his employer took an adverse employment action against him; and (3) a causal connection exists between the protected activity and the adverse employment action.[225]

As discussed in the previous section, there is, following the *Rachid* decision, some uncertainty in the Fifth Circuit regarding what standard of causation is applicable in retaliation cases. It is similarly less than clear whether, to survive summary judgment, retaliation plaintiffs may rebut an employer's stated reasons for an adverse employment action with mere evidence that retaliation was one motivating factor or whether they must prove that the employer's stated reason was false or otherwise pretextual. While these aspects of Fifth Circuit retaliation law are unclear, plaintiffs in this circuit will be heartened by a recent U.S. Supreme Court decision which expanded upon the sort of adverse employment actions which might support a retaliation claim.

In *Burlington Northern & Santa Fe Railway Company v. White*, the Supreme Court affirmed a jury's sex discrimination award for a female forklift operator who was transferred to a more physically demanding job and temporarily suspended after she sued her employer for sexual harassment.[226] In so ruling,

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[223] *See* CBOCS West, Inc. v. Humphries, 128 S. Ct. 30 (2007). In *Foley v. University of Houston Systems*, 355 F.3d 333, 339 (5th Cir. 2003), the Fifth Circuit held that retaliation claims may, in fact, be brought under § 1981 but this holding is in doubt pending the U.S. Supreme Court's decision in *Humphries*.

[224] Wheeler v. BL Dev. Corp., 415 F.3d 399, 405 (5th Cir. 2005).

[225] Banks v. E. Baton Rouge Parish Sch. Bd., 320 F.3d 570, 575 (5th Cir. 2003); Gee v. Principi, 289 F.3d 342, 345 (5th Cir. 2002).

[226] Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006). It should be noted that *White* only discusses one type of retaliation claim: the so-called "participation claim" in which the plaintiff alleges retaliation for having "participated in any manner in an investigation, proceeding, or hearing" under Title VII. *See* 42 U.S.C. § 2000e-3(a).

the Supreme Court held that the scope of adverse actions covered under Title VII retaliation claims extends beyond "ultimate employment decisions," such as "hiring, granting leave, discharging, promoting, and compensating."[227] The Court clarified that the retaliation plaintiff must instead show that a reasonable employee "would have found the challenged action materially adverse, 'which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"'[228]

While courts have had little time to absorb the implications of the *White* decision, it appears, at least in principle, to represent a significant expansion of the retaliation cause of action in the Fifth Circuit. Indeed, the Fifth Circuit had previously required that a plaintiff prove that he or she suffered an "ultimate employment decision" in order to recover in retaliation cases,[229] and the Supreme Court in *White* expressly rejected this standard. The Supreme Court also made it clear that it was promulgating a less stringent burden of proof for Title VII retaliation claims than for Title VII discrimination claims. The Court based this lessened burden upon the language of the retaliation provisions of Title VII, which, it concluded, were less demanding than the comparable discrimination provisions of Title VII.[230] As noted previously, other federal discrimination statutes contain similar retaliation provisions, and it therefore seems likely that *White* will be held applicable in those contexts as well.[231]

The Fifth Circuit's "ultimate employment decision" standard has thus clearly been abolished, but the "materially adverse" standard which replaced it is sufficiently vague as to

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[227] *White*, 126 S. Ct. at 2410.

[228] *Id.* (citing Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006).

[229] *See, e.g.*, Mattern v. Eastman Kodak Co., 104 F.3d 702, 705-07 (5th Cir. 1997); Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir.1995) (requiring a showing of an ultimate employment decision, such as "hiring, granting leave, discharging, promoting, and compensating" in retaliation cases).

[230] *White*, 126 S. Ct. at 2411 (discussing 42 U.S.C. § 2000e-2(a) and 42 U.S.C. § 2000e-3(a)).

[231] *See, e.g.*, Sconfienza v. Verizon Pa., Inc., 2007 WL 1202976 at 17, n.42 (M.D. Pa. Apr. 23, 2007).

leave the Fifth Circuit some leeway to insert its own ideas as to whether a "reasonable person" would have found a given action to be "materially adverse." Given the Fifth Circuit's original conclusion that only "ultimate employment decisions" should give rise to retaliation claims, it seems likely that the court will be inclined to give a less-than-expansive interpretation to the "materially adverse" standard.

It is submitted that care should be taken to not read *White* too expansively, lest the retaliation cause of action be expanded well beyond the scope intended by either Congress or the Supreme Court. The author bases this conclusion both on the practical realities of the retaliation cause of action and upon the language of *White* itself, which appears to recognize these realities and is less permissive than one might suspect upon first reading.

With regard to the practical concerns, it is the author's experience that the filing of a discrimination or harassment claim by an employee very commonly gives rise to entirely sincere and largely inevitable conflicts between the complaining employee and his or her co-workers. Very commonly, the true facts surrounding the conduct which is the subject of the plaintiff's complaint are known only to the plaintiff and the employee(s) against whom the charges are leveled. Under these circumstances, a claim of discrimination often involves the plaintiff's word against that of the accused, and the accused typically provides his co-workers with a version of events which differs greatly from that of the plaintiff. In addition, employees very commonly feel a powerful sense of loyalty towards their employer and have an understandable concern for the financial wellbeing of the company which employs them. Moreover, particularly in a conservative state such as Mississippi, there are very commonly employees who simply have a personal distaste for litigation. As a result, it is very frequently the case that the filing of a charge of discrimination results in strained relationships and hard feelings which, in a broad sense, a reasonable person would find to be "adverse."

In light of the foregoing, it is submitted that the "materially adverse" standard should be interpreted as requiring something

significantly more than the strained relationships and resulting disputes which are largely inherent in the retaliation context. A closer reading of *White* suggests that the Supreme Court shares at least some of these concerns. For example, the Supreme Court approvingly quoted an employment discrimination treatise for the proposition that "snubbing by supervisors and co-workers" is not actionable,[232] and this language would appear to encompass many of the conflicts referenced above. The Court further observed that "Title VII . . . does not set forth 'a general civility code for the American workplace,'" thus providing further indication that the Supreme Court did not intend to delve into the personal conflicts that often arise in the retaliation context.[233]

To be certain, however, the Supreme Court in *White* did provide specific examples of "materially adverse" actions which certainly would not have qualified as "ultimate employment decisions" under prior Fifth Circuit precedent. The potentially broad scope of the Supreme Court's holding in *White* is highlighted by the following passage in the opinion:

> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. . . . A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. . . . A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. . . . Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others."[234]

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[232] *White*, 126 S. Ct. at 2415 (citing 1 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 669 (3d ed. 1996)).

[233] *Id.* (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).

[234] *Id.* at 2415-16 (citations omitted).

Clearly, a "schedule change" or an exclusion from a "weekly training lunch" would not have qualified as an "ultimate employment decision" under prior Fifth Circuit precedent, and it is thus apparent that *White* has expanded significantly upon the sort of actions which might support recovery in retaliation cases. It appears that the challenge which will confront district courts in applying *White* will be to give effect to the significantly expanded scope of "adverse" actions which may support retaliation claims while at the same time recognizing that the decision does not make actionable the personal disputes and conflicts which frequently arise in the retaliation context.

While it is too early to draw final conclusions regarding *White*'s impact in the Fifth Circuit, a review of early Fifth Circuit decisions suggests that its impact will most likely be significant but not dramatic. Indeed, a search of Fifth Circuit decisions applying *White* reveals only one decision which concluded that plaintiffs had established retaliation under the new standard,[235] while eight other decisions concluded that they had not.[236] Significantly, five decisions were found which remanded for a consideration of the cases under the new law without reaching a decision either way as to the merits of the retaliation claim.[237] Other Fifth Circuit decisions have taken note of *White* while deciding the appeal on some other basis.[238] In *McCoy v. City of Shreveport*, for example, the Fifth Circuit noted that it was "at least a close question whether [defendant's]

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[235] Pryor v. Wolfe, 196 F. App'x 260, 263 (5th Cir. 2006).

[236] Earle v. Aramark Corp., 247 F. App'x 519 (5th Cir. 2007); Hart v. Life Care Ctr. of Plano, 243 F. App'x 816 (5th Cir. 2007); Strong v. Univ. HealthCare Sys., L.L.C., 482 F.3d 802 (5th Cir. 2007); Grice v. FMC Techs., Inc., 216 F. App'x (5th Cir. 2007); Bryan v. Chertoff, 2007 WL 216297 (5th Cir. 2007); DeHart v. Baker Hughes Oilfield Operations, Inc., 214 F. App'x 437 (5th Cir. 2007); McCullough v. Kirkum, 212 F. App'x 281 (5th Cir. 2006); Peace v. Harvey 207 F. App'x 366, 368 (5th Cir. 2006); Kebiro v. Walmart, 193 F. App'x 365, 369 (5th Cir. 2006).

[237] Lee v. Dep't of Veterans Affairs, 247 F. App'x 472 (5th Cir. 2007); Holloway v. Dep't of Veterans Affairs, 244 F. App'x 566 (5th Cir. 2007); Lemaire v. Louisiana Dep't of Transp. and Dev., 480 F.3d 383, 389 (5th Cir. 2007); Despres v. City of San Antonio, 211 F. App'x 283 (5th Cir. 2006); Easterling v. Sch. Bd. of Concordia Parish, 196 F. App'x 251 (5th Cir. 2006).

[238] *See, e.g.*, Russell v. Univ. of Tex. of Permian Basin, 234 F. App'x 195 (5th Cir. 2007).

placing [plaintiff] on paid administrative leave constituted an adverse employment action under the [*White*] standard" but the court found it unnecessary to resolve this issue since the plaintiff's claims failed on a separate basis.[239] The Fifth Circuit did indicate, however, that while the district court properly found that no "adverse employment action" was present based upon the Fifth Circuit's old "ultimate employment action" standard, this presented a much closer issue in light of *White*.[240]

McCoy illustrates how, even after *White*, the Fifth Circuit's retaliation decisions continue to require that a plaintiff demonstrate an adverse *employment* action, even though the Supreme Court indicated that adverse actions need not be employment-related in order to constitute retaliation. Indeed, the Supreme Court wrote in *White* that, "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace. . . . A provision limited to employment-related actions would not deter the many forms that effective retaliation can take."[241]

The Supreme Court highlighted this point by citing a Tenth Circuit decision finding actionable retaliation where the defendant filed false criminal charges against the plaintiff in retaliation for filing a charge of discrimination.[242] It is unclear whether the Fifth Circuit's continued reference to adverse "employment" actions is merely an inconsequential matter of semantics or whether it augers a narrow interpretation of the *White* decision at the Fifth Circuit.

Turning to early Mississippi district court decisions applying *White*, four opinions were found which dismissed claims on summary judgment under the new retaliation standards[243] and two opinions were found which denied

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[239] McCoy v. City of Shreveport, 492 F.3d 551, 561 (5th Cir. 2007).

[240] *Id.* at 559.

[241] *White*, 126 S. Ct. at 2412 (citations omitted) (emphasis removed).

[242] *Id.* (citing Berry v. Stevinson Chevrolet, 74 F.3d 980, 984 (10th Cir. 1996)).

[243] Smith v. Murphy & Sons, Inc., 2007 WL 2475877 (N.D. Miss. Aug. 28, 2007); McQueen v. City of Columbus, 2007 WL 624362 (N.D. Miss. Feb. 23, 2007); Sessom v. Home Depot U.S.A., Inc., 2006 WL 3210484 (N.D. Miss. Nov. 6, 2006); McDaniel v.

summary judgment under these standards.[244] In *Stover v. Hattiesburg Public School District*, Judge Starrett concluded that genuine issues of material fact existed as to whether a reasonable employee in the plaintiff's position would have found a "reduction or reassignment of job duties and negative evaluations" to be "materially adverse" under *White*.[245] Judge Starrett accordingly denied summary judgment as to the plaintiff's retaliation claims. Similarly, in *Snapp v. Ruan*, Judge Mills found that genuine issues of material fact existed regarding retaliation claims involving allegations that a manager had, in addition to a number of alleged personal affronts and insults, changed the plaintiff's work hours, taken away her keys to the office, and demoted her from being a salaried dispatcher, back to being an hourly employee.[246]

It is unclear how the aforementioned claims would have fared under the "old" law, but the early authority does suggest that Mississippi plaintiffs have had some success under the new standards set forth in *White*. This is scarcely surprising, given the breath and scope of the *White* decision. As with the *Rachid* decision, the changes in Fifth Circuit law brought about by *White* are simply too significant to not have a considerable effect at the district court level, and it may therefore be expected that the coming years will see an increase in the number of retaliation actions which survive summary judgment in Mississippi district courts.

C. Trends in Sexual and Racial Harassment Law in the Fifth Circuit

Claims alleging sexual and/or racial harassment in the workplace are frequently asserted in Mississippi district courts.

Johanns, 2006 WL 2794326 (N.D. Miss. Sept. 27, 2006).

[244] Stover v. Hattiesburg Pub. Sch. Dist., 2007 WL 465664 (S.D. Miss. Feb. 8, 2007); Snapp v. Ruan Transp. Corp., 2006 WL 2455922 (N.D. Miss. Aug. 22, 2006).

[245] Stover v. Hattiesburg Pub. Sch. Dist., 2007 WL 465664 (S.D. Miss. Feb. 8, 2007). While Judge Starrett accepted the plaintiff's allegations as true for summary judgment purposes, he later awarded attorney's fees against plaintiff for what he deemed to be the frivolous nature of her retaliation claims. *Id.*

[246] Snapp v. Ruan Transp. Corp., 2006 WL 2455922 (N.D. Miss. Aug. 22, 2006).

In the 1986 decision of *Meritor Savings Bank v. Vinson,* the U.S. Supreme Court first held that sexual harassment which is sufficiently "severe or pervasive" to alter the conditions of the plaintiff's employment and create an abusive working environment may support recovery, even if the harassment results in only psychological or emotional injuries.[247] Prior to *Meritor*, many courts had limited sexual harassment cases to so-called "quid pro quo" claims, but the Supreme Court made it clear in *Meritor* that severe or pervasive sexual harassment may be compensable, regardless of "whether or not it is directly linked to the grant or denial of an economic *quid pro quo.*"[248] Sexual and racial harassment actions were made even more attractive by the Civil Rights Act of 1991, which authorized compensatory and (in appropriate cases) punitive damages for intentional discrimination, including harassment.[249]

In hostile work environment cases, the two key issues are often (1) whether the harassment was sufficiently severe to support recovery, and, (2) assuming that it is, whether the employer should be held liable for it. District courts apply uniform standards to the first issue, while the standards applicable to the second depend upon whether the case involves harassment by the plaintiff's co-worker or supervisor. To state a Title VII hostile work environment claim relating to harassment by either a co-worker or supervisor, a plaintiff must first establish (1) that he or she belongs to a protected class, (2) that he or she was subject to unwelcome harassment, (3) that the harassment was based on the plaintiff's protected characteristic, and (4) that the harassment was so severe or pervasive as to affect a "term, condition, or privilege" of employment.[250]

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[247] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986); Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

[248] *Meritor Sav. Bank, FSB,* 477 U.S. at 64.

[249] Prior to the 1991 Act, Title VII plaintiffs were entitled to recover only equitable remedies such as backpay. Accordingly, prior to the 1991 Act, a plaintiff who could prove only a hostile work environment without harm to her employment status (and thus no right to backpay) could recover no monetary damages. *See* H. LEWIS & E. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE, § 2.22 (2d ed. 2001).

[250] Woods v. Delta Beverage Group, Inc., 274 F.3d 295 (5th Cir. 2001) (citing Shepherd v. Comptroller of Pub. Accounts of State of Tex., 168 F.3d 871, 873 (5th Cir.

For harassment to affect a "term, condition, or privilege of employment" it must be, both objectively and subjectively, so "severe or pervasive [] as to alter the conditions of employment and create an abusive working environment."[251] The Fifth Circuit recently resolved an inconsistency in its case law by holding that "[h]arassment need not be severe *and* pervasive to impose liability; one or the other will do."[252] The Supreme Court has stated that "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."[253] The Fifth Circuit has held that whether an environment is hostile or abusive depends on the totality of the circumstances, focusing on factors such as the frequency of the conduct, its severity, the degree to which the conduct is physically threatening or humiliating, and the degree to which the conduct unreasonably interferes with an employee's work performance.[254]

The stringent nature of the aforementioned standard was demonstrated in the 1999 decision of *Shepherd v. Comptroller of Public Accounts of the State of Texas*.[255] In *Shepherd*, the Fifth Circuit found no severe or pervasive harassment to be present where the plaintiff's co-worker told the plaintiff on one occasion that her elbows were "the same color as [her] nipples"; once simulated looking under her dress while remarking that she had "big thighs"; on several occasions attempted to look down her clothing; on several occasions touched her arm, rubbing it from wrist to shoulder; and, during two office meetings, while pointing to his lap, stated, "here's your seat."[256] The Fifth

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1999)).

[251] Watts v. Kroger Co., 170 F.3d 505, 509 (5th Cir. 1999); Hockman v. Westward Commc'ns, L.L.C., 407 F.3d 317, 325 (5th Cir. 2004).

[252] Harvill v. Westward Commc'ns, L.L.C., 433 F.3d 428, 435 (5th Cir. 2005) (quoting Hostetler v. Quality Dining, Inc., 218 F.3d 798, 808 (7th Cir. 2000)).

[253] Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (quotation marks and citations omitted).

[254] *Hockman*, 407 F.3d at 325-26.

[255] Shepherd v. Comptroller of Pub. Accounts of State of Tex., 168 F.3d 871, 872 (5th Cir. 1999).

[256] *Id.*

Circuit characterized these actions and comments as "boorish and offensive" but nevertheless concluded that they were not "severe."[257] In so concluding, the Fifth Circuit noted that none of the co-worker's actions physically threatened the plaintiff, nor would they interfere with a reasonable person's work performance or competence.[258]

Assuming that a showing of sufficiently severe harassment is made, then, in co-worker harassment cases, a simple negligence standard applies to determine whether the employer is to be held liable. That is, the court considers whether the employer knew or should have known about the harassment and failed to take prompt remedial action.[259] The Fifth Circuit has held that a Title VII employer has actual knowledge of harassment that is known to "higher management," and it has constructive knowledge "if through the exercise of reasonable care it should have known what was going on."[260]

In cases involving severe or pervasive harassment by a supervisor, the employer's liability hinges upon the application of standards set forth in the 1998 Supreme Court decisions of *Faragher v. City of Boca Raton,*[261] and *Burlington Industries v. Ellerth.*[262] Although *Faragher* and *Ellerth* dealt with claims of sexual harassment, the Fifth Circuit has held their reasoning to be applicable to claims of racial harassment as well.[263] Under the *Faragher/Ellerth* approach, a plaintiff may hold an employer vicariously liable, i.e. without fault on the employer's part, if the plaintiff can show that she suffered a "tangible

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[257] *Id.* at 874.

[258] *Id.*

[259] Woods v. Delta Beverage Group, Inc., 274 F.3d 295 (5th Cir. 2001) (citing *Shepherd*, 168 F.3d at 873).

[260] Sharp v. City of Houston, 164 F.3d 923, 929-30 (5th Cir. 1999). The court indicated in *Sharp* that the term "higher management" refers to those with "remedial power" or authority to address a problem. *Id.* at 930.

[261] Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[262] Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

[263] Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 593 (5th Cir. 1998) (stating that "it appears that the Court [in *Ellerth* and *Faragher*] intended to apply these same agency principles to all vicarious liability inquiries under Title VII for acts by supervisors, including racial discrimination").

employment action" resulting from the unlawful harassment. The Supreme Court in *Ellerth* wrote that a tangible employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," and, in most cases, "inflicts direct economic harm."[264]

Once a showing of a tangible employment action has been made, the employer cannot escape liability for a supervisor's severe or pervasive harassment, even if it was unaware that the harassment had taken place. It should be noted that, in the 2003 decision of *Ackel v. National Communications, Inc.*, a Fifth Circuit panel concluded that vicarious liability should apply in an additional context, namely when the "harassing employee is a proxy for the employer."[265] However, Judge Emilio Garza wrote in a concurring opinion that this conclusion was inconsistent with *Faragher/Ellerth*,[266] and the *Ackel* holding does not appear to have found subsequent application in the Fifth Circuit.

Even if the plaintiff is unable to prove a tangible employment action, she may still recover for severe or pervasive harassment by a supervisor that results in a hostile work environment. However, under the *Faragher/Ellerth* approach, the employer has the opportunity to assert an affirmative defense (a) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior by a supervisor, and (b) that the plaintiff employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by [it] or to avoid harm otherwise."[267]

While it may appear, at first blush, that the *Faragher/Ellerth* affirmative defense is merely a more specific way for the employer to establish that it did not act negligently, a closer review reveals that this is not the case. The

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[264] *Ellerth*, 524 U.S. at 761-62.

[265] Ackel v. Nat'l Commc'ns, Inc., 339 F.3d 376, 383 (5th Cir. 2003).

[266] *Id.* at 387-88.

[267] *Id.*

Faragher/Ellerth defense requires the employer to not only demonstrate that it acted reasonably in preventing and correcting any harassment by its supervisors, but *also* that the employee unreasonably failed to take advantage of any corrective measures. As a result, even assuming that the employer takes all possible steps to both prevent and correct harassment, it will still be subject to vicarious liability for its supervisor's harassment if the employee promptly reports the harassment. The *Faragher/Ellerth* standard is thus appropriately regarded as a hybrid negligence/strict liability standard, since the employer's lack of negligence is a necessary but not a sufficient precondition for it to establish its affirmative defense.

There has been some judicial resistance to the *Faragher/Ellerth* defense, including at the Fifth Circuit. In the 1999 decision of *Indest v. Freeman Decorating, Inc.*, Judge Edith Jones wrote that, even though the plaintiff promptly complained of sexual harassment, the fact that the employer "promptly responded, disciplined [the supervisor] appropriately and stopped the harassment" meant that it should face no liability under Title VII.[268] While the other two judges on the *Indest* panel concurred in the result affirming the district court's grant of summary judgment, they did not join Judge Jones's actual opinion, which means that it lacks precedential value. Indeed, Judge Wiener wrote in a concurring opinion that, in light of *Faragher/Ellerth*, "we cannot affirm the district court's rejection of [the plaintiff's] claim solely on the basis of [the defendant's] prompt and adequate response" since the plaintiff had "quickly reported" the supervisor's behavior.[269]

In subsequent decisions, the Fifth Circuit has duly applied the *Faragher/Ellerth* standard as written, but the same judicial resistance to the *Faragher/Ellerth* standard which was present in *Indest* has manifested itself in a rather broad application of the employer's affirmative defense. For the most part, employers have had little trouble in establishing the first part of

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[268] Indest v. Freeman Decorating, Inc., 164 F.3d 258, 267 (5th Cir. 1999).

[269] *Id.* at 796 (Wiener, specially concurring).

the affirmative defense, in the Fifth Circuit and elsewhere. Indeed, one commentator has written, following an extensive review of authority, that "federal courts in virtually every circuit interpret the employer's obligation to prevent workplace harassment under prong one of the affirmative defense as satisfied by proof of a sexual harassment policy and grievance procedure."[270]

With regard to the second part of the affirmative defense, the Fifth Circuit has required that a plaintiff not only report harassment by a supervisor, but also that she do so promptly. In *Casiano v. AT&T Corporation*, for example, the Fifth Circuit found that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities" because, even though "he suffered at least fifteen propositions [over a four month period, he] never reported any of the incidents until months after the last of them."[271] In *Williams v. Administrative Review Board*, the Fifth Circuit found that the plaintiffs failed to promptly report harassment when they waited one month to do so.[272]

In addition to requiring that plaintiffs promptly report any harassment, the Fifth Circuit has made establishing the second part of the *Faragher/Ellerth* defense easier for employers in other respects. Most notably, the Fifth Circuit has rejected arguments that a plaintiff's subjective fear of retaliation might be a sufficient reason for failing to report acts of harassment to her employer. In *Harper v. City of Jackson Municipal School District*,[273] for example, the Fifth Circuit held that a plaintiff's explanation that she was too intimidated to report sexual harassment was insufficient to show that her failure to complain and cooperate were "reasonable" under *Faragher/Ellerth*. In so concluding, the Fifth Circuit approvingly quoted from a prior district court opinion that, "[a]ll harassment victims risk retaliation when they complain. For Title VII to be properly

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[270] Anne Lawton, *Operating in an Empirical Vacuum: The* Ellerth *and* Faragher *Affirmative Defense*, 13 COLUM J. GENDER & L. 197, 214-15 (2004).

[271] Casiano v. AT&T Corp., 213 F.3d 278, 287 (5th Cir. 2000).

[272] Williams v. Admin. Review Bd., 376 F.3d 471, 479 (5th Cir. 2004).

[273] Harper v. City of Jackson Mun. Sch. Dist., 149 F. App'x 295, 301 (5th Cir. 2005).

facilitated, the reasons for not complaining about harassment should be substantial and based upon objective evidence that some significant retaliation will take place."[274] In the 2006 decision of *Snap v. Ruan*,[275] Judge Mills considered a case in which a plaintiff complained of bizarre and extensive harassment on the part of a supervisor, which she admittedly failed to report to her employer. The harassment included the supervisor's watching the plaintiff while she was using the bathroom through a removed ceiling tile and collecting hair from her chair and brush.[276] The supervisor was eventually criminally prosecuted and jailed for these actions. Under these circumstances, Judge Mills found the plaintiff's subjective fear of physical retaliation to be reasonable, and he indicated that, if Fifth Circuit authority permitted him to do so, he would likely consider her failure to report the harassment as not precluding recovery under *Faragher/Ellerth*.[277] Judge Mills concluded, however, that Fifth Circuit authority did not permit him to reach this result.[278]

While plaintiffs would no doubt take issue with some of the aforementioned Fifth Circuit holdings, it is still apparent that the *Faragher/Ellerth* standard makes it easier for them to establish employer liability for a supervisor's harassment than under the negligence standard applicable in cases of co-worker harassment. It may be true that a reluctance on the part of many courts to impose liability against employers that acted reasonably has led them to interpret the second part of the *Faragher/Ellerth* defense broadly in favor of employers. Nevertheless, the fact remains that a plaintiff can make it impossible for an employer to avoid liability for severe or pervasive harassment by simply reporting the harassment in a prompt manner and by cooperating in any

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[274] *Id.* at 301 (citing Young v. R.R. Morrison and Son, Inc., 159 F. Supp. 2d 921 (N.D. Miss. 2000)).

[275] Snapp v. Ruan Transport Corp., 2006 WL 2455922, slip op. (N.D. Miss. Aug. 22, 2006).

[276] *Id.* at *4-5.

[277] *Id.*

[278] *Id.*

investigation. As such, the ball is to a large extent in the plaintiff's court, and liability in supervisor sexual harassment cases often turns on the plaintiff's actions in this regard.

Constructive discharge claims

Plaintiffs alleging workplace harassment will frequently assert so-called "constructive discharge" claims, in which they allege that they suffered harassment so severe that they had no choice but to quit their jobs. A plaintiff who asserts a hostile-environment constructive discharge claim "must show working conditions so intolerable that a reasonable person would have felt compelled to resign."[279] In determining whether an employee has been constructively discharged, courts in the Fifth Circuit consider the following factors: (1) whether there was a demotion; (2) whether there was a reduction in salary; (3) whether there was a reduction in job responsibilities; (4) whether there was a reassignment to menial or degrading work; (5) whether there was badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (6) whether there were offers of early retirement that would make the employee worse off, regardless of whether the offer was accepted.[280]

In the 2005 decision of *Pennsylvania State Police v. Suders*, the U.S. Supreme Court held that employers could avail themselves of the *Faragher/Ellerth* affirmative defense in constructive discharge cases involving harassment by supervisors, so long as an "official act" does not "underlie the constructive discharge."[281] In so ruling, the Supreme Court rejected the view of some circuits that, where a plaintiff establishes a constructive discharge, that per se demonstrates a "tangible employment action" within the meaning of *Faragher/Ellerth*, thus rendering the employer vicariously

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[279] Pa. State Police v. Suders, 542 U.S. 129, 147 (2004); *see also* Faruki v. Parsons, 123 F.3d 315, 319 (5th Cir. 1997); Ward v. Bechtel Corp., 102 F.3d 199, 202 (5th Cir. 1997); Barrow v. New Orleans S.S. Ass'n, 10 F.3d 292, 297 (5th Cir. 1994).

[280] *Barrow*, 10 F.3d at 297.

[281] *Suders*, 542 U.S. at 148.

liable without recourse to any affirmative defense.[282]

The Supreme Court in *Suders* explained that the *Faragher/Ellerth* affirmative defense is unavailable to employers if "the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions."[283] These examples do not appear to differ markedly from the examples of "tangible employment actions" set forth in *Faragher/Ellerth*, and it is accordingly not clear that *Suders* makes it significantly easier for constructive discharge plaintiffs to hold their employers liable than in regular harassment cases.

It is unclear whether, under *Suders*, extensive participation by supervisors in harassment which would lead a reasonable employee to quit, without more, might suffice to establish that the constructive discharge resulted from an "official act." This was the fact pattern before the Supreme Court in *Suders*, and the Court's silence regarding whether those facts might serve to establish employer liability raises questions concerning the scope of the decision. The aforementioned examples of demotions, transfers, and cuts in pay would seem to suggest that mere participation in harassment by supervisors would not suffice, absent some kind of employment-related action. The Supreme Court did not expressly so indicate, however, and this is an issue which the lower courts will need to resolve.

One suspects that the Fifth Circuit will simply apply *Suders* as written, and, if such is the case, then this will likely render constructive discharge claims somewhat less attractive to plaintiffs in this circuit. That is, *Suders* seems to require a constructive discharge plaintiff to make a showing of considerably more severe harassment without making it significantly easier to hold the employer vicariously liable for that harassment. Assuming *Suders* is applied in this manner,

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[282] *See, e.g.*, Suders v. Easton, 325 F.3d 432, 436 (3d Cir. 2003) *rev'd sub nom* Pa. St. Police v. Suders, 542 U.S. 129 (2004).

[283] *Suders*, 542 U.S. at 134.

then it seems likely that it will be easier for many plaintiffs to simply proceed under a regular hostile work environment theory. On the other hand, establishing constructive discharge may open the door to an increased recovery of damages than would otherwise be the case, and this may be sufficient reason for plaintiffs to continue to pursue constructive discharge claims.

D. Adoption of Disparate Impact Theory in ADEA Cases

In 2005, a case originating in a Mississippi district court resulted in one of the more significant employment discrimination holdings in recent years. In *Smith v. City of Jackson*, originally filed before Judge Barbour, the U.S. Supreme Court resolved a split of authority among the circuits by holding that plaintiffs may maintain ADEA claims under a disparate impact theory.[284] Disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another."[285] By contrast, the disparate treatment claims which comprise most employment discrimination actions involve allegations that the employer intentionally discriminated against workers on the basis of a protected characteristic such as race, sex, or age.[286]

The U.S. Supreme Court first recognized disparate impact claims in the 1972 decision of *Griggs v. Duke Power*.[287] *Griggs* was a Title VII case which involved an employer's policy of requiring employees to either pass an intelligence test or to have a high school diploma in order to secure employment. While the employer's policy was facially neutral, it had a negative and disproportionate impact on black employees, which led the Supreme Court to find it unlawful. The Supreme Court held that proof of intentional discrimination was not required under a disparate impact theory so long as it could be shown that the

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[284] Smith v. City of Jackson, 544 U.S. 228 (2005).

[285] Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 335-36, n.15 (1977).

[286] Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).

[287] 401 U.S. 424 (1971).

tests had a disparate impact on workers in a protected class.[288] In cases where such a disparate impact was shown, the *Griggs* Court held that the burden shifted to the employer to demonstrate that "any given requirement . . . [has] a manifest relationship to the employment in question,"[289] and this came to be known as the "business necessity" standard.[290]

Disparate impact claims were dealt a very serious blow by the 1989 Supreme Court decision of *Wards Cove Packing Company v. Atonio*.[291] The Supreme Court in *Wards Cove* first raised the plaintiff's burden for establishing a prima facie case by requiring proof that the "application of a specific or particular employment practice" has had "significantly disparate impact on employment opportunities."[292] The Court then lowered the employer's burden of rebutting any such showing by abolishing the "business necessity" standard in favor of a requirement that employers prove that the "challenged practice serves, in a significant way, [their] legitimate employment goals."[293] Finally, the Court raised the burden for plaintiffs to rebut this showing by requiring proof that an alternative, and less discriminatory, business practice would be as "equally effective" as the employer's chosen practice in achieving the employer's "legitimate employment goals," with such factors as cost to the employer being relevant considerations.[294]

For the most part, the *Wards Cove* setback to disparate impact claims proved short lived (at least in Title VII cases) as Congress appeared to overrule most aspects of the decision in the 1991 Civil Rights Act. Most notably, the 1991 Act made the employer's burden of rebutting the plaintiff's prima facie case more difficult by statutorily incorporating the "business necessity" standard as part of Title VII. Certain ambiguities in the language of the 1991 Act have left commentators to wonder

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[288] *Id.* at 432.

[289] *Id.*

[290] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 980 (1988).

[291] 490 U.S. 642 (1989).

[292] *Id.* at 657.

[293] *Id.* at 659.

[294] *Id.* at 661.

to what extent remnants of *Wards Cove* might remain,[295] but a discussion of this issue is beyond the scope of this article. At any rate, for all the judicial and congressional activity on the subject of disparate impact claims, the Supreme Court had, prior to 2005, never expressly decided whether such claims could be brought under the ADEA. Notably, the ADEA does contain a provision which makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."[296] This language closely tracks the Title VII language which gave rise to the *Griggs* holding, and it is therefore unsurprising that circuit courts nationwide had originally agreed that the Title VII disparate impact theory applied equally in ADEA cases.[297]

A split among the circuits developed on this issue, however, following the Supreme Court's 1993 decision in *Hazen Paper Company v. Biggins*.[298] In *Hazen Paper*, the Supreme Court made ADEA disparate treatment claims more difficult to establish by holding that, to support recovery, a plaintiff's age must have "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome."[299] Significantly, the Supreme Court rejected the notion that an employer violates the ADEA by merely "acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age."[300] While the

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[295] *See, e.g.*, Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896, 906 (1993) ("On the issue of business necessity, the Act merely returns the courts to where they were just prior to *Wards Cove*, and appears to provide little guidance as to what direction they should take from there. The courts are saddled, instead, with a rich but uncertain legislative history arising from two years of complicated political maneuvering.").

[296] 29 U.S.C. § 623(a)(2).

[297] *See, e.g.*, Holt v. Gamewell Corp., 797 F.2d 36, 37 (1st Cir. 1986); Maresco v. Evans Chemetics, 964 F.2d 106, 115 (2d Cir. 1992); Blum v. Witco Chem. Corp., 829 F.2d 367, 372 (3d Cir. 1987).

[298] 507 U.S. 604, 610 (1993).

[299] *Id.* at 610.

[300] *Id.* at 608.

holding in *Hazen Paper* was limited to disparate treatment claims, the Supreme Court's observation that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA"[301] led several circuits, including the Fifth Circuit in *Smith*, to conclude that disparate impact claims could not be maintained under the ADEA.[302]

Smith involved a pay plan adopted by the City of Jackson pursuant to which police officers with less than five years tenure were given raises that were proportionately greater than those who had served longer than five years. Since most of the older officers had been with the department longer than five years, they received proportionately lower raises than did younger officers. The older officers filed suit against the city, alleging violations of the ADEA under, *inter alia*, a disparate impact theory. The Fifth Circuit, on appeal of a summary judgment ruling by Judge Barbour, concluded that disparate impact claims were not viable under the ADEA.[303] In so concluding, the Fifth Circuit relied heavily upon the "reasonable factor other than age" (RFOA) provision of the ADEA, which provides that it shall not be unlawful for an employer "to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age . . . discrimination."[304] This provision had previously been used by federal courts to give a restrictive interpretation of ADEA actions in varying contexts, most notably by the Supreme Court in *Hazen Paper*.

On writ of certiorari, the Supreme Court in *Smith* definitively resolved this issue by holding that disparate impact claims may be maintained under the ADEA.[305] While this holding was welcome news to plaintiffs, the Court emphasized that very significant differences exist between disparate impact claims brought under the ADEA and those brought under Title VII, which differences render recovery under the former

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[301] *Id.* at 610.

[302] Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003), *aff'd on other grounds*, 544 U.S. 228 (2005).

[303] *Id.* at 193.

[304] 29 U.S.C. § 623(f)(1) (2006).

[305] *Smith*, 544 U.S. at 228.

considerably more difficult than under the latter. The first of the distinctions noted by the Supreme Court is the aforementioned RFOA provision in the ADEA, which lacks a counterpart in Title VII. While the Supreme Court concluded that the RFOA provision did not serve to bar disparate impact claims outright, it did conclude that the provision warranted a more rigorous standard of proof in ADEA cases. The other distinction noted by the Supreme Court relates to the fact that, while Congress modified Title VII in the 1991 Civil Rights Act to largely abrogate the *Wards Cove* holding, it did not modify the ADEA in a similar manner.[306] This omission by Congress, whether deliberate or not, permitted the Supreme Court in *Smith* to resurrect the considerably more stringent *Wards Cove* standard of proof and apply it to ADEA cases. Joined by four other Justices, Justice Stevens concluded that "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA."[307]

Applying this standard, the Supreme Court in *Smith* found the plaintiffs' proof to be lacking in several important respects. First, the Court found that the plaintiffs failed to introduce proof of "any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers," i.e. that they failed to make out their prima facie case under the *Wards Cove* standard.[308] The Court further found that, even if the plaintiffs had presented such proof, the City of Jackson's decision to grant a larger raise to less senior employees for the purpose of bringing salaries in line with that of surrounding police forces was a "decision based on a 'reasonable factor other than age' that responded to the City's legitimate goal of retaining police officers."[309] The Supreme Court thus incorporated both the RFOA provision and the *Wards Cove* standard and found that each supported a conclusion that the City's policy did not violate the ADEA.

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[306] *Id.* at 240.

[307] *Id.*

[308] *Id.* at 241.

[309] *Id.* at 242.

While Mississippi plaintiffs will no doubt welcome the Supreme Court's conclusion that disparate impact claims are viable under the ADEA, it should be apparent that the combined effect of the *Wards Cove* standard and the RFOA provision should make recovery rather difficult in most ADEA disparate impact cases. Accordingly, while *Smith* is clearly an important decision, its actual impact upon district court litigation, in Mississippi and elsewhere, will likely be less than dramatic.

E. Overview of Current Trends in 42 U.S.C. § 1983 litigation in Mississippi

While § 1983 litigation has not seen the same level of change in recent years as some of the previously discussed areas of the law, § 1983 actions are too important a part of Mississippi district court practice not to discuss here. Section 1983 is extraordinarily broad in its scope, permitting plaintiffs to recover against "persons" acting "under color of state law" for violations of the U.S. Constitution and federal law. For all their breadth, however, § 1983 actions in Mississippi focus largely upon claims against municipal law enforcement personnel based upon acts taken within the scope of their duties.

Simply stated, there are a limited number of contexts in which municipalities or their employees might violate an individual's rights under the U.S. Constitution and/or federal law, and these contexts largely involve law enforcement activities. The Mississippi Tort Claims Act provides substantial barriers to recovery under state law against police officers performing their official duties,[310] and it virtually eliminates state law actions by prisoners against governmental defendants.[311] Section 1983 actions thus fill an important gap in

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[310] *See* MISS. CODE ANN. § 11-46-9(1)(c) (2006), providing that

> (1) [a] governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim . . . (c) [a]rising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury.

[311] *See* MISS. CODE ANN. § 11-46-9(1)(m) (2006), providing that

Mississippi's jurisprudence, but it must be emphasized that there are very substantial limitations upon the scope of § 1983 actions, in Mississippi and elsewhere.

One important limitation is that § 1983 actions against the State of Mississippi or one of the "arms of the state" are barred on two separate grounds. First, the U.S. Supreme Court has held that § 1983 does not trump the Eleventh Amendment immunity enjoyed by states from suits for monetary damages in federal court.[312] This is clearly a major limitation upon the utility of § 1983 for Mississippi plaintiffs, since a wide range of Mississippi governmental entities have been found to be "arms of the state" and thus immune under the Eleventh Amendment.[313] Even assuming that Eleventh Amendment immunity were somehow inapplicable, the U.S. Supreme Court has held that § 1983 does not apply to states on the independent basis that, unlike municipalities,[314] states are not considered "persons" within the meaning of § 1983.[315] It is thus apparent that any § 1983 action seeking monetary damages against the State of Mississippi or one of its "arms" is a non-starter, in either federal or state court.

Another very significant limitation upon § 1983 actions is

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(1) [a] governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim . . . (m) [o]f any claimant who at the time the claim arises is an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution, regardless of whether such claimant is or is not an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution when the claim is filed.

[312] Quern v. Jordan, 440 U.S. 332 (1979).

[313] *See, e.g.*, O'Neal v. Miss. Bd. of Nursing, 113 F.3d 62 (5th Cir. 1997); Cooley v. Miss. Dep't of Transp., 96 F. Supp. 2d 565 (S.D. Miss. 2000); Kinnison v. Miss. Dep't of Wildlife, Fisheries, & Parks, 990 F. Supp. 481 (S.D. Miss. 1998); Scanlon v. Dep't of Mental Health, 828 F. Supp. 421 (S.D. Miss. 1993); Hammett v. Miss. Univ. for Women, 2005 WL 1420885 (N.D. Miss. June 9, 2005); Bryant v. Military Dept. of State of Miss. *ex rel.* Miss. Air Nat. Guard, 381 F. Supp. 2d 586 (S.D. Miss. 2005); Walker v. Miss. State Bd. of Med. Licensure, 2000 WL 33907678 (N.D. Miss. 2000); White v. Miss. Pub. Serv. Comm'n, 2006 WL 37118 (N.D. Miss. Jan. 5, 2006). The governmental entities found to be "arms of the state" for Eleventh Amendment immunity purposes should be apparent from the captions of these cases.

[314] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

[315] Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989).

that liability under the statute does not extend to conduct that is merely negligent; the Supreme Court has held that some showing of heightened misconduct is required.[316] The precise standards involved in a given § 1983 claim depend upon the context in which the claim arose and the specific constitutional provision which was allegedly violated. For example, excessive force claims against police officers which arose prior to any detention (such as during arrests or traffic stops) are analyzed under the Fourth Amendment standard.[317]

To succeed on an excessive force claim under the Fourth Amendment, a plaintiff in the Fifth Circuit must demonstrate that (1) he suffered an injury, (2) which "resulted directly and only from the use of force that was clearly excessive to the need," and (3) the force used was objectively unreasonable.[318] The Supreme Court emphasized in *Graham v. Connor* that the "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene and must account for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation.[319] It should be noted that the Fifth Circuit originally held that a plaintiff wishing to establish a Fourth Amendment excessive force claim must show that he suffered a "significant injury," rather than merely "an injury" as quoted above.[320] However, in *Hudson v. McMillian*, the Supreme Court rejected a "significant injury" requirement in the context of an Eighth Amendment excessive force claim.[321] The Fifth Circuit, applying *Hudson*, concluded that plaintiffs are no longer required to show a significant injury in the Fourth Amendment context either, although plaintiffs are required to demonstrate something more than a de minimus injury.[322]

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[316] Eason v. Thaler, 73 F.3d 1322, 1329 n.3 (5th Cir. 1996) (citing Daniels v. Williams, 474 U.S. 327, 328 (1986) and Davidson v. Cannon, 474 U.S. 344, 347 (1986)).

[317] Graham v. Connor, 490 U.S. 386 (1989).

[318] Bazan v. Hidalgo Co., 246 F.3d 481, 487 (5th Cir. 2001).

[319] *Graham*, 490 U.S. at 396-97.

[320] Johnson v. Morel, 876 F.2d 477, 479 (5th Cir. 1989).

[321] Hudson v. McMillian, 503 U.S. 1, 8 (1992).

[322] *See, e.g.*, Tarver v. City of Edna, 410 F.3d 745, 752 (5th Cir. 2005); Williams v.

Section 1983 claims brought by prisoners complaining of the conditions of their confinement are raised in the context of Eighth Amendment claims. The Eighth Amendment protects inmates from cruel and unusual punishment and imposes a duty upon prison officials to "ensure that inmates receive adequate food, clothing, shelter, and medical care."[323] A prisoner must satisfy a two-part test to establish that the conditions of his confinement violated the Eighth Amendment. First, he must demonstrate an objective component of conditions so serious as to "deprive him of the minimal measure of life's necessities."[324] Second, he must establish that the responsible prison officials subjectively acted with "deliberate indifference" to his conditions of confinement.[325] In *Wilson v. Seiter*, the U.S. Supreme Court rejected a reading of the Eighth Amendment that would allow liability to be imposed on prison officials solely because of the presence of objectively inhumane prison conditions, noting that its "cases mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment."[326]

Among the most common Eighth Amendment claims are allegations that prison officials showed deliberate indifference to a prisoner's needs by failing to provide him with proper medical care. In such cases, the subjective nature of the Eighth Amendment deliberate indifference standard requires the plaintiff to show that the prison official actually knew of and disregarded an excessive risk to the inmate health or safety;[327] deliberate indifference cannot be inferred from a mere failure to act reasonably.[328] In the 2002 decision of *Lawson v. Dallas County*, the Fifth Circuit found deliberate indifference to have

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Bramer, 180 F.3d 699, 703 (5th Cir. 1999); Harper v. Harris Co., 21 F.3d 597, 600 (5th Cir. 1994).

[323] Burnette v. Bureau of Prisons, 2007 WL 4328808 (5th Cir. 2007) (citing Farmer v. Brennan, 511 U.S. 825, 832 (1994)).

[324] Calhoun v. Hargrove, 312 F.3d 730, 734 (5th Cir. 2002); Berry v. Brady, 192 F.3d 504, 507 (5th Cir. 1999).

[325] Harper v. Showers, 174 F.3d 716, 720 (5th Cir. 1999).

[326] Wilson v. Seiter, 501 U.S. 294, 299 (1991).

[327] Easter v. Powell, 467 F.3d 459, 463 (5th Cir. 2006).

[328] Hare v. City of Corinth, 74 F.3d 633, 649 (5th Cir. 1996).

been established where the defendants had "actual knowledge" that a paraplegic inmate had decubitus ulcers yet failed to follow the instructions of hospital doctors regarding treatment of the condition.[329] Similarly, the Fifth Circuit held in the 2006 decision of *Easter v. Powell* that a prisoner stated a claim for deliberate indifference by alleging that a prison nurse refused to provide any treatment to him for his severe chest pain even though she knew that he had a history of cardiac problems.[330] In each case, the Fifth Circuit found the facts alleged to be sufficiently compelling to support a finding of deliberate indifference, even under the subjective Eighth Amendment standard.

It should be noted that special obstacles confront prisoners in § 1983 cases. In particular, the Prison Litigation Reform Act establishes a number of procedural and substantive hurdles for § 1983 prisoner litigants to surmount, including by requiring the payment of a civil filing fee in all cases and by requiring that plaintiffs prove a physical injury prior to recovering emotional distress damages.[331] Section 1983 actions by prisoners are also significantly limited by the U.S. Supreme Court's 1994 decision of *Heck v. Humphrey*.[332] The Supreme Court in *Heck* concluded that a § 1983 action is not an appropriate vehicle for challenging the validity of outstanding criminal judgments and that, accordingly, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff "would necessarily imply the invalidity of his conviction or sentence."[333] If such a judgment would, in fact, imply the invalidity of the conviction, then the complaint must be dismissed unless the plaintiff can demonstrate that the

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[329] Lawson v. Dallas Co., 286 F.3d 257, 262 (5th Cir. 2002).

[330] Easter v. Powell, 467 F.3d 459, 464 (5th Cir. 2006).

[331] *See* 42 U.S.C. § 1997e(e) ("No federal civil action may be brought by a prisoner confined to a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."). *See also* Geiger v. Jowers, 404 F.3d 371, 374 (5th Cir. 2005).

[332] 512 U.S. 477 (1994).

[333] *Id.* at 487.

conviction or sentence has already been invalidated.[334] *Heck* thus serves to bar a number of otherwise valid § 1983 actions, including certain Fourth Amendment claims, whose success would cast doubt upon an underlying criminal judgment.[335]

Assuming that the plaintiff's allegations do not fall under either the Fourth or Eighth Amendments but are, rather, general substantive due process claims, the Supreme Court has nevertheless made it clear that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty and property."[336] The prohibition against § 1983 claims based upon purely negligent misconduct further explains why § 1983 claims, in Mississippi and elsewhere, so heavily involve allegations of some intentional, unconstitutional act on the part of law enforcement personnel.

To be certain, § 1983 claims are sometimes asserted outside of the law enforcement context. Of these claims, it is the writer's experience that First Amendment retaliation claims by public employees are among the most common in Mississippi. The politicized climate which exists in many local government entities in this state frequently results in lawsuits by municipal employees who allege that they suffered an adverse employment action in retaliation for having spoken out against their employer or for having engaged in political activities protected

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[334] That is, the Supreme Court held in *Heck* that the claim is barred unless the plaintiff demonstrates that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.*

[335] The Fifth Circuit has generally given a stringent (from the plaintiff's perspective) interpretation of *Heck*. In a 1996 decision, for example, the Fifth Circuit barred a § 1983 action by a prisoner who alleged that a police officer had used excessive force in arresting him. *See* Hudson v. Hughes, 98 F.3d 868, 874 (5th Cir. 1996). The prisoner had been convicted of battery upon an officer, and the court reasoned that the excessive force claim, if substantiated, might cast doubt upon the underlying conviction. *Id. But see* Ballard v. Burton, 444 F.3d 391, 398 (5th Cir. 2006) (reaching a different conclusion in a Mississippi case involving a plaintiff alleging excessive force who was convicted of simple assault on an officer).

[336] Daniels v. Williams, 474 U.S. 327, 328 (1986). *See also* Davidson v. Cannon, 474 U.S. 344, 347 (1986).

by the First Amendment. In order to succeed on a First Amendment retaliation claim, an employee must show that (1) he suffered an adverse employment decision; (2) his speech involved a matter of public concern; (3) his interest in commenting on matters of public concern outweighs his employer's interest in promoting efficiency; and (4) his speech motivated the adverse employment decision.[337]

While a comprehensive discussion of First Amendment retaliation claims is beyond the scope of this article, it should be noted that such claims have been significantly limited by the 2006 U.S. Supreme Court decision of *Garcetti v. Ceballos*.[338] In *Garcetti*, the Supreme Court held that "when public employees make statements pursuant to their official duties, the employers are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[339] *Garcetti* still leaves open the possibility that plaintiffs will be able to show that their statements were not made pursuant to their official duties, but it is apparent that the decision has made recovery in First Amendment retaliation claims considerably more difficult for many plaintiffs. Public employees alleging wrongful discharge sometimes assert procedural due process claims under § 1983, but such actions will generally only lie in unusual cases, such as cases involving tenured university professors, where the plaintiff has a constitutionally-protected property interest in his continued employment.[340]

Even assuming that the requisites for establishing a First Amendment or any other constitutional violation are met, § 1983 plaintiffs still face significant obstacles to recovery against municipal defendants. Perhaps the most significant limitation upon § 1983 actions, in Mississippi and elsewhere, relates to the fact that municipalities cannot be held vicariously liable under § 1983 for the actions of their employees. While

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[337] Whiting v. Univ. of S. Miss., 451 F.3d 339, 350 (5th Cir. 2006).

[338] Garcetti v. Ceballos, 547 U.S. 410 (2006).

[339] *Id.*

[340] *See, e.g., Whiting*, 451 F.3d at 350-51.

Eleventh Amendment immunity does not apply to municipalities, and they are considered "persons" under § 1983, the U.S. Supreme Court held in the seminal 1978 decision of *Monell v. Department of Social Services* that municipalities are liable only for their own acts and not those attributed to them by principles of respondeat superior.[341] More precisely stated, a municipality, as well as officers thereof acting in their official capacity, can be held liable under § 1983 only if a municipal "official policy or custom" caused the deprivation of a constitutional right.[342]

An official policy consists of, among other things, a policy statement or regulation that is officially adopted and promulgated by the municipality's lawmaking officers.[343] Thus, a formal action taken by a county board of supervisors or a city council would suffice to establish official policy under § 1983. An official policy might also include a "persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted or promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy."[344] It is comparatively rare for a Mississippi county or city to face § 1983 liability for an official action taken by its board of supervisors or city council, and it is also rare (at least in recent decades) for municipal officials or employees to have a "persistent, widespread practice" of committing constitutional violations.

The typical § 1983 case in Mississippi involves allegations of isolated constitutional violations committed by city or county employees, most commonly Fourth or Eighth Amendment excessive force claims against individual police officers or jail employees. In such cases, the plaintiff typically finds it far more difficult to survive summary judgment as to the municipality than as to the individual employee. As to the employee, the plaintiff need only survive a qualified immunity defense, which,

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[341] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690-91 (1978).

[342] *See Monell*, 436 U.S. at 694; Spiller v. City of Tex. City, 130 F.3d 162, 167 (5th Cir. 1997).

[343] *See* Williams v. Kaufman Co., 352 F.3d 994, 1013 (5th Cir. 2003).

[344] Fields v. City of S. Houston, 922 F.2d 1183, 1191-92 (5th Cir. 1991).

as discussed *infra*, means that he must establish fact issues as to whether the employee violated clearly established constitutional rights of which a reasonable person would have been aware.[345] While this is often a difficult showing in its own right, it generally constitutes a less onerous burden than establishing municipal liability under § 1983.

Frequently, § 1983 plaintiffs will attempt to create municipal liability by arguing that a municipality had a policy or custom of inadequately training its employees, thus resulting in a constitutional violation by a particular employee. However, in *City of Canton v. Harris*, the U.S. Supreme Court made it difficult for plaintiffs to prevail on such arguments by holding that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."[346] The Court has clarified that, to demonstrate such deliberate indifference, a showing of "simple or even heightened negligence will not suffice,"[347] though the court did indicate that a "pattern of tortious conduct by inadequately trained employees"[348] might make the need for improved training so "plainly obvious" to the municipality as to meet the standard.[349] As a practical matter, however, meeting the "deliberate indifference" standard will be a tall order in most § 1983 inadequate training cases.

The U.S. Supreme Court has made it even more difficult for plaintiffs to hold a municipality liable for its decision to hire an employee who later commits constitutional violations. In *Board of County Commissioners v. Brown*, the Supreme Court held that, to establish the requisite degree of culpability on the part

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[345] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Mendenhall v. Riser, 213 F.3d 226, 230 (5th Cir. 2000).

[346] City of Canton v. Harris, 489 U.S. 378, 388 (1989). The Supreme Court later clarified that the "deliberate indifference" standard is an objective one in this context, even though the standard is a subjective one when used in the Eighth Amendment context. Farmer v. Brennan, 511 U.S. 825, 840-41 (1994).

[347] Bd. of Co. Comm'rs v. Brown, 520 U.S. 397, 407 (1997).

[348] *Id.* at 407-08.

[349] *Id.* at 409 (discussing *City of Canton*, 489 U.S. at 390, n.10).

of a municipality, the evidence must support a finding that the employee hired by the municipality was "highly likely to inflict the particular injury suffered by the plaintiff."[350] Only with such evidence will a plaintiff be able to demonstrate the municipality's "conscious disregard for a high risk" that a particular employee would commit a *particular* constitutional violation.[351] The Court made it clear that a "finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury."[352] This standard would appear to preclude municipal liability for individual hiring decisions in all but the most extreme cases.

Probably the best of the bad options available to plaintiffs for establishing municipal liability is to demonstrate that constitutional violations were committed by a municipal official possessing "final policymaking authority" regarding the action in question.[353] Whether a person is a "final policymaker" for a municipality regarding a particular matter is a question of state law.[354] In *Pembaur v. City of Cincinnati*, the U.S. Supreme Court held that a county faced liability under § 1983 where the county prosecutor, a final policymaker under Ohio law, directed deputy sheriffs to take actions in violation of the Fourth Amendment.[355] Thus, in cases where the policymaker himself engages in constitutional violations, the violations may be considered to be the result of an official city or county policy so as to give rise to municipal liability. Accordingly, § 1983 plaintiffs will often seek to show that a given constitutional violation was committed by a sheriff, chief of police, mayor or other policymaking official within their respective spheres of policymaking authority. This is usually a difficult showing for plaintiffs to make, but it is often less so than the other options

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[350] *Id.* at 412.

[351] *Id.* at 415.

[352] *Id.* at 412.

[353] Brady v. Fort Bend Co., 145 F.3d 691, 698-99 (5th Cir. 1998) (citing McMillian v. Monroe Co., 520 U.S. 781 (1997)).

[354] Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989).

[355] Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81, 484-85 (1986).

available to plaintiffs in this context.

Despite their best efforts, plaintiffs are generally unsuccessful in surviving summary judgment as to any claims against municipalities. There are simply too many legal obstacles for them to overcome, for the reasons previously stated. As a result, § 1983 plaintiffs in this state, if they survive summary judgment at all, are usually limited to claims against officers in their individual capacities. While individual employees do not enjoy the same level of legal protection as that enjoyed by municipalities, they do employ one powerful weapon: the defense of qualified immunity.

The doctrine of qualified immunity shields a government official from civil liability for damages based upon the performance of discretionary functions if the official's acts did not violate clearly established constitutional or statutory law of which a reasonable person would have known.[356] The privilege is an immunity from suit rather than a mere defense to liability, and as a result, the Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation."[357] While qualified immunity is generally regarded as a defense, it is the plaintiff, rather than the defendant, who does most of the heavy lifting in this context. That is, a § 1983 defendant need only plead the qualified immunity defense and demonstrate that he is a governmental official whose position involves the exercise of discretion in order to place the burden on the plaintiff to establish that the defendant is not entitled to qualified immunity.[358]

> To determine whether a defendant is entitled to qualified immunity, the court engages in a two-pronged analysis, inquiring (1) whether the plaintiff has alleged a violation of a constitutional right and, if so, (2) whether the defendant's behavior was objectively reasonable under clearly established

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[356] Easter v. Powell, 467 F.3d 459, 462 (5th Cir. 2006).

[357] Saucier v. Katz, 533 U.S. 194, 200-01 (2001) (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991)).

[358] Hampton v. Oktibbeha Co. Sheriff Dep't, 480 F.3d 358, 363 (5th Cir. 2007) (citing Pierce v. Smith, 117 F.3d 866, 871-72 (5th Cir. 1997) (quotation omitted)).

law at the time the conduct occurred.[359]

On first blush, the second prong may appear somewhat legalistic in nature, inquiring as to the reasonableness of the officer's conduct in light of "clearly established law." However, the U.S. Supreme Court has taken care to not impute a legal scholar's knowledge of the law to individual officers, and the Court has been rather deferential to the law enforcement decisions made by officers, in a variety of contexts. In establishing relevant Fourth Amendment standards, for example, the Supreme Court has "cautioned against the '20/20 vision of hindsight' in favor of deference to the judgment of reasonable officers on the scene."[360] Consistent with this approach, the U.S. Supreme Court has held that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," thus suggesting that the "reasonableness" standard is much closer to a gross negligence standard than to a simple negligence standard.[361]

The wide scope of the qualified immunity defense is demonstrated by the Supreme Court's 1987 decision in *Anderson v. Creighton*. In *Anderson*, the Supreme Court held that an officer's warrantless search of a residence was not unreasonable in light of clearly established law even though it was undisputed that, absent a warrant, probable cause and exigent circumstances were required by relevant Fourth Amendment precedent.[362] In nevertheless concluding that qualified immunity applied, the Court concluded that the relevant inquiry was whether "a reasonable officer could have believed [the] warrantless search to be lawful."[363] The Supreme Court further clarified that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand

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[359] *Hampton*, 480 F.3d at 363 (citing *Easter*, 467 F.3d at 462).

[360] *Saucier*, 533 U.S. at 205 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).

[361] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[362] Anderson v. Creighton, 483 U.S. 635, 640 (1987).

[363] *Id.* at 641.

that what he is doing violates that right."[364] The *Anderson* decision is very significant for establishing that the officer's reasonable *belief* that his actions were lawful may support a qualified immunity defense even where there exists clearly established law indicating that his actions were not, in fact, lawful.

In addition to the favorable substantive law relating to qualified immunity, officers asserting the defense enjoy a significant procedural advantage over plaintiffs. That is, a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291.[365] Thus, in cases where a district court denies an officer's qualified immunity defense based upon more or less clear facts, an interlocutory appeal usually results, and the Fifth Circuit has not been hesitant to reverse denials of qualified immunity defenses by district courts.[366] This is a very important factor in encouraging district courts to carefully consider qualified immunity defenses rather than merely deferring to the judgment of a jury, as is often the inclination of trial courts when confronted with close summary judgment issues.

While the aforementioned authority may make surviving a qualified immunity defense seem hopeless, the reality is often less bleak for plaintiffs. Although it can sometimes be a difficult burden for a plaintiff to prove that an officer violated "clearly established constitutional rights," it is frequently a manageable one in cases where a plaintiff alleges that an officer intentionally used clearly excessive force against him.[367] Thus,

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[364] *Id.* at 640 (citations omitted).

[365] Mitchell v. Forsyth, 472 U.S. 511, 530 (1985); *see also* Kinney v. Weaver, 367 F.3d 337, 346 (5th Cir. 2004) (en banc) ("Although a denial of a defendant's motion for summary judgment is ordinarily not immediately appealable, the Supreme Court has held that the denial of a motion for summary judgment based upon qualified immunity is a collateral order capable of immediate review.").

[366] *See, e.g.*, Bacque v. Leger, 207 F. App'x 374, 376 (5th Cir. 2006); Nance v. New Orleans & Baton Rouge Steamship Pilots' Ass'n, 174 F. App'x 849, 854 (5th Cir. 2006); Nickleberry v. Johnson, 146 F. App'x 705, 708 (5th Cir. 2005).

[367] Moreover, in the 2002 decision of *Hope v. Pelzer*, 536 U.S. 730 (2002), the U.S. Supreme Court gave plaintiffs a victory by holding that officials can be on notice that

in the typical § 1983 case involving allegations of excessive force against a police officer, it will generally be much easier for plaintiffs to survive a qualified immunity defense raised by the officer than a *Monell* defense raised by the municipality which employed him.

Intriguingly, however, there are indications that the distinction between individual and municipal liability in § 1983 cases may not be as great at it appears from the governing legal standards. Based upon statements from attorneys practicing in this area, Mississippi cities and counties very commonly have either formal or informal indemnification agreements with officers who have been sued in their individual capacities. Alternatively, a municipality may simply choose to voluntarily satisfy a judgment against one of its officers, perhaps out of concerns over being able to recruit and retain officers worried about potential liability. According to statements from plaintiffs' attorneys, a § 1983 plaintiff in Mississippi who manages to obtain a jury verdict against an individual police officer can generally expect that this verdict will be satisfied by the officer's employer. If so, this would be an extremely important factor which would render the *Monell* obstacles to municipal liability much less significant, as a practical matter.

Another ray of light for potential § 1983 plaintiffs is that punitive damages may be awarded against individual employees, although not against municipalities,[368] where the employee's conduct "is 'motivated by evil intent' *or* demonstrates 'reckless or callous indifference' to a person's constitutional rights."[369] Emotional distress damages may also be available if the plaintiff can demonstrate a "specific discernable injury to [his] emotional state" resulting from a constitutional violation, proven with evidence regarding the "nature and extent" of the harm.[370] Moreover, 42 U.S.C. § 1988(b) provides that a district

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their conduct violates clearly established law even absent previous cases on point, so long as the state of the law gave them "fair warning that their conduct violated the constitution."

[368] City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

[369] Williams v. Kaufman Co., 352 F.3d 994, 1015 (5th Cir. 2003).

[370] Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 938-40 (5th Cir.1996) (applying

court may, in its discretion, award a prevailing party in a § 1983 action "reasonable" attorney's fees. The Fifth Circuit has held that to be deemed a "prevailing party," a plaintiff must receive "some relief on the merits of his claim."[371] In addition, Federal Rule of Civil Procedure 54(d) provides that "costs other than attorney's fees [shall] be allowed to the prevailing party unless the court provides otherwise." Accordingly, while the path to prevailing in any § 1983 action is long and arduous, a substantial recovery may await plaintiffs who are able to do so.

It should also be noted that, while § 1983 plaintiffs will face similar obstacles statewide in surviving summary judgment motions, the same cannot be said for their prospects at any eventual trial. Even more so than most federal actions, the success of § 1983 actions at trial is heavily influenced by the location where they are tried. Indeed, the attitudes of potential jurors towards law enforcement, and their willingness to second-guess law enforcement decisions, vary substantially depending upon the location in which the trial is held. This is one of the largely unspoken factors in § 1983 litigation, although it remains very much a pertinent one. Regardless of where the trial is held, however, the preceding authority should make it clear that merely making it to trial usually requires a plaintiff to overcome a litany of substantive and procedural obstacles which will continue to make § 1983 litigation one of the most challenging areas of federal law for plaintiffs, in Mississippi and elsewhere.

IV. Recent Trends in Federal Arbitration Act Litigation

Historically, federal courts have adopted a decidedly laissez

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Carey v. Piphus, 435 U.S. 247, 248 (1978)). While *Carey* addressed damages awarded in actions brought under 42 U.S.C. § 1983, the Fifth Circuit has applied its rationale in Title VII cases, and all other "cases involving federal claims for emotional harm." *Patterson,* 90 F.3d at 938 n.11. *See also* Vadie v. Miss. State Univ., 218 F.3d 365, 376-77 (5th Cir. 2000).

[371] Walker v. City of Mesquite, 313 F.3d 246, 249 (5th Cir. 2002) (quoting Hewitt v. Helms, 482 U.S. 755, 760 (1987)). *See also* Energy Mgmt. Corp. v. City of Shreveport, 467 F.3d 471, 482 (5th Cir. 2006); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 605 (2001) (holding that a prevailing party exists where there is a "judicially sanctioned change in the legal relationship of the parties").

faire attitude towards their state court counterparts. This attitude has its origins in the Anti-Injunction Act passed by Congress in 1793, which provides that "[a] court of the United States may not grant an injunction to stay proceedings in a state court, except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[372] The U.S. Supreme Court has likewise established limitations upon federal courts enjoining or reviewing state court actions.[373] This deferential attitude also manifests itself in cases where a plaintiff seeks for a federal court to abstain from hearing a matter in deference to a related action pending in state court. In such cases, the U.S. Supreme Court has held, pursuant to the *Colorado River* doctrine, that federal courts ordinarily have a "virtually unflagging obligation" to exercise the jurisdiction conferred on them by Congress and may only decline to exercise this jurisdiction in exceptional circumstances.[374]

Lawsuits brought in federal court to compel arbitration of state court actions constitute a rather emphatic departure from the "live and let live" attitude which generally prevails between federal and state courts. Under the Federal Arbitration Act,[375] a defendant who feels that it has been sued in state court contrary to the terms of an arbitration agreement may file a separate FAA action in federal court, thereupon becoming the "arbitration plaintiff." If the arbitration plaintiff is successful, and such plaintiffs usually are in the Fifth Circuit, then it may

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[372] 28 U.S.C. § 2283 (2006).

[373] In *Younger v. Harris*, 401 U.S. 37, 91 (1971), for example, the U.S. Supreme Court held that federal courts were prohibited from enjoining state criminal proceedings absent a showing of "extraordinary circumstances" that would warrant federal intervention. In a similar vein, the *Rooker-Feldman* doctrine may preclude federal court review of a state court judgment, although this doctrine has recently been limited to circumstances where "the losing party in state court filed suit in federal court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment." *See* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291 (2005).

[374] Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817-19 (1976). *See also* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 103 S. Ct. 927 (1983).

[375] 9 U.S.C. § 1 (2006).

generally obtain an order staying the state court action pending arbitration. Of course, defendants sued in federal court may also file motions, rather than separate actions, to compel arbitration of the federal lawsuit, and the standards for deciding these motions are generally the same.

There is some difference of opinion, among district and appellate judges, regarding just how willing district courts should be to stay state court proceedings in arbitration cases. Among Mississippi district judges, Judge Starrett has shown considerable reluctance to enjoin state court actions, observing that the "Supreme Court has not yet determined the appropriateness of injunctive relief in cases to compel arbitration."[376] Other Mississippi district judges have been much more willing to enter orders staying state court actions in arbitration cases, on the basis of the All Writs Act, 28 U.S.C. § 1651, which provides that federal courts may "issue all writs necessary or appropriate in aid of their respective jurisdictions."[377] Fifth Circuit authority supports their authority to do so, with one decision flatly stating that "[i]n this circuit, district courts may stay parallel state proceedings after compelling arbitration."[378]

While Mississippi district courts can, and do, enjoin state actions in arbitration cases, at least one Fifth Circuit judge has expressed reservations about the practice. In a concurring opinion in *American Heritage Life Insurance Company v. Orr*, Circuit Judge James L. Dennis conceded the *authority* of district courts to stay state court proceedings under the All Writs Act but opined that they should closely examine whether a stay of state court proceedings is "necessary as a matter of practicality."[379] Judge Dennis observed that "[o]nce the federal court has issued an order compelling arbitration, parties would risk sanctions such as contempt of court by refusing to follow the

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[376] *See, e.g.* JPMorgan Chase Bank, N.A. v. Lott, 2007 WL 30271, *5 n.6 (S.D. Miss. 2007).

[377] AmSouth Bank v. Bowens, 351 F. Supp. 2d 571, 575 n.4 (S.D. Miss. 2005); Shelley v. Coldwell Banker Real Estate Corp., 2006 WL 1313825, *3 n.4 (N.D. Miss. 2006).

[378] Ford Motor Co. v. Woods, 165 Fed. Appx. 345, 345-46 (5th Cir. 2006).

[379] American Heritage Life Ins. Co. v. Orr, 294 F.3d 702, 714 (5th Cir. 2002).

order," and he thus suggested that enjoining state court actions will be unnecessary in most cases.[380]

While there is thus some disagreement regarding the practice of enjoining state court actions, the fact remains that the Fifth Circuit has been broadly supportive of arbitration as a whole. Several years ago, plaintiffs would loudly scream in protest as defendants sought to compel arbitration of claims brought in state court. In light of numerous Fifth Circuit rulings enforcing arbitration clauses, these screams are often little more than a whimper today, barring a truly unusual fact pattern which serves to distinguish a particular case from the clear line of Fifth Circuit authority supporting arbitration. Indeed, a significant reduction in the number of FAA actions (at least in the author's experience) would appear to suggest that many Mississippi plaintiffs are simply not filing suit in cases where arbitration clauses are involved.

Although a federal statute, the FAA does not create federal jurisdiction, and some independent jurisdictional basis—usually diversity jurisdiction—must therefore be present.[381] In considering a motion to compel arbitration under the FAA, a Mississippi district court must determine (1) whether the parties agreed to arbitrate the dispute, and (2) if so, whether any federal statute or policy precludes arbitration.[382] When deciding the first issue, courts generally apply state law principles governing the formation of contracts, although the application of this law is heavily informed by the FAA's policy objectives favoring arbitration.[383] These policy objectives have been held to prevent a court from applying any state law which purports to construe an arbitration agreement more strictly than non-arbitration agreements.[384]

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[380] *Id.*

[381] Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc., 138 F.3d 160, 163 n.1 (5th Cir.1998).

[382] R.M. Perez & Assocs., Inc. v. Welch, 960 F.2d 534, 538 (5th Cir. 1992).

[383] Webb v. Investacorp, Inc., 89 F.3d 252, 258 (5th Cir. 1996) (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995)).

[384] Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 167 (5th Cir. 2004) (citing Perry v. Thomas, 482 U.S. 483, 492-93 n.9 (1987)). *See also* Banc One

In determining whether the parties agreed to arbitrate a dispute, Mississippi district courts must consider "whether there is a valid agreement to arbitrate between the parties and . . . whether the dispute in question falls within the scope of that arbitration agreement."[385] Most arbitration litigation in Mississippi has centered around the first question. In arguing that a valid agreement to arbitrate does not exist, Mississippi arbitration defendants have repeatedly raised certain defenses, including that these agreements were entered into fraudulently and/or that they are "unconscionable" under Mississippi law.

Prior to analyzing Mississippi substantive law regarding these defenses, it must first be noted that the party opposing arbitration must carry the initial burden of convincing a district court that the court, rather than an arbitrator, should consider any such defenses to arbitration. This is made considerably more difficult by the U.S. Supreme Court's 1967 decision of *Prima Paint Corporation v. Flood and Conklin Manufacturing Company*, where the court held that the statutory language of the FAA does not permit the federal court to consider claims of fraud in the inducement of the contract generally, but, rather, only claims that the arbitration agreement itself was entered into as a result of fraud.[386]

Applying *Prima Paint* as interpreted by the Fifth Circuit, Mississippi district courts have held that other defenses to arbitration, such as the defenses of procedural and/or substantive unconscionability, which relate to the contract as a whole, rather than to the arbitration agreement alone, must be considered by the arbitrator rather than by the district court. In *American Bankers Insurance Company of Florida v. Milsap*, for example, Judge Lee considered arguments of unconscionability arising from "the disparity in the sophistication of the parties, [the arbitration plaintiff] being a multi-million dollar corporation on the one hand, and the Defendant being poor, uneducated and relatively an unsophisticated individual in

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Acceptance Corp. v. Hill, 367 F.3d 426, 432-33 (5th Cir. 2004).

[385] *Hill*, 367 F.3d at 429.

[386] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967).

matters of finance on the other," as well as arguments that the contract used "legalistic terms." Citing *Prima Paint*, Judge Lee concluded that:

> [M]anifestly, these allegations concerning the arbitration agreement are 'generally applicable to the agreement as a whole' and thus resolution of [the arbitration defendant's] procedural unconscionability argument must be submitted to the arbitrator as part of the underlying dispute.[387]

While Mississippi district courts do not consistently engage in a *Prima Paint* analysis prior to considering unconscionability arguments, Judge Lee's opinion in *Milsap* applied established Fifth Circuit precedent,[388] and it is thus apparent that, in many cases, *Prima Paint* remains a significant hurdle for arbitration defendants to overcome in convincing a district court to even consider their defenses to arbitration.

Assuming that an arbitration defendant is able to convince a district judge to consider his defenses to arbitration, Mississippi substantive law, as established by the Mississippi Supreme Court, does contain some helpful authority for the party opposing arbitration. In the 2002 decision of *East Ford, Inc. v. Taylor*, the Mississippi Supreme Court held that an arbitration defendant may demonstrate that an arbitration provision is procedurally unconscionable by showing "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms."[389] The court found procedural unconscionability to be present in *East Ford* where the arbitration defendant was not told of the arbitration provision before signing the contract; where the font size of the provision was one-third the size of other terms of the contract; and where the arbitration provision was not underlined or emphasized and did not otherwise alert the reader

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[387] American Bankers Ins. Co. of Florida v. Milsap, 350 F. Supp. 2d 730, 734 (S.D. Miss. 2004.)

[388] Banc One Acceptance Corp. v. Hill, 367 F.3d 426, 429 (5th Cir. 2004).

[389] East Ford, Inc. v. Taylor, 826 So. 2d 709, 714 (Miss. 2002).

to its importance.[390]

With regard to the defense of substantive unconscionability, the supreme court in *East Ford* observed, rather vaguely, that "[s]ubstantive unconscionability may be proven by showing the terms of the arbitration agreement to be oppressive."[391] The supreme court in *East Ford* apparently agreed with the arbitration defendant's argument that the arbitration provision was substantively unconscionable where, under the terms of the agreement, only he was required to arbitrate while the arbitration plaintiff retained the right to pursue most, if not all, of its claims against him in a court of law. The court also appeared to place weight upon the fact that the arbitration defendant's remedy was "limited to actual damages because the arbitration provision prevents an award of punitive damages no matter how egregious the conduct on the part of [the arbitration plaintiff] might be."[392]

In the 2005 decision of *Pitts v. Watkins*, the Mississippi Supreme Court similarly found substantive unconscionability to be present in a contract where (1) one party retained the right to pursue remedies in court, while the other party was limited to arbitration; (2) a limitation of liability provision had the practical effect of being extremely one-sided; and (3) a limitations period shortened the statutory period for commencement of any action for remedies.[393] In the 2007 decision of *Rogers-Dabbs Chevrolet—Hummer, Inc. v. Blakeney,* the supreme court held that a plaintiff's civil fraud claim fell outside the scope of the arbitration agreement, although the court seemed to indicate that its ruling was based largely on the egregious fact pattern which was present in that case.[394] In *Price v. Coldwell Banker Real Estate Corporation*, Judge Pepper concluded that, particularly in light of prior Fifth Circuit arbitration decisions, *Blakeney* was "confined to its facts and

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[390] *Id.* at 714-17.

[391] *Id.* at 714.

[392] *Id.*

[393] Pitts v. Watkins, 905 So. 2d 553 (Miss. 2005).

[394] Rogers-Dabbs Chevrolet–Hummer, Inc. v. Blakeney, 950 So. 2d 170, 178 (Miss. 2007).

cannot be used to invalidate the arbitration agreement in this case."[395] It is apparent that Judge Pepper's conclusion in this regard is consistent with the general approach taken by the Fifth Circuit in arbitration cases.

Indeed, from reading the aforementioned Mississippi Supreme Court decisions, one might conclude that Mississippi's substantive law of arbitration is somewhat favorable for the party opposing arbitration. The reality of the matter, however, is that there is a substantial difference between the results reached in federal court in arbitration cases applying Mississippi law and in Mississippi state courts applying the same law. While the Fifth Circuit duly applied *East Ford* in an appeal involving the very same arbitration provision,[396] other Fifth Circuit decisions rendered after *East Ford* make it clear that demonstrating either procedural or substantive unconscionability in federal court is quite difficult.

In *Washington Mutual Finance Group v. Bailey*, for example, the Fifth Circuit rejected arguments of procedural unconscionability in a case where the arbitration defendants were illiterate and were not informed that they were signing an arbitration agreement. In so ruling, the Fifth Circuit wrote as follows:

> We similarly reject [the argument] that the agreement is unconscionable and unenforceable because [the arbitration plaintiff] failed specifically to inform the Illiterate Appellees that they were signing an arbitration agreement after having been made aware of the Illiterate Appellees' inability to read. As we previously have noted, Mississippi law charges parties to a contract with the obligation to read that contract or "have it read to [them]," and does not permit such a party "to admit that he signed it . . . but did not read it or know its stipulations."[397]

While there is arguably tension between the Fifth Circuit's ruling in *Bailey* and the Mississippi Supreme Court's definition

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[395] Price v. Coldwell Banker Real Estate Corp., 2007 WL 2122635 (N.D. Miss. 2007).

[396] Banc One Acceptance Corp. v. Hill, 367 F.3d 426, 431 (5th Cir. 2004).

[397] Washington Mut. Fin. Group, LLC v. Bailey, 364 F.3d 260, 265 (5th Cir. 2004).

of procedural unconscionability in *East Ford*, it is indisputably the Fifth Circuit Court of Appeals which reviews the arbitration rulings of Mississippi district courts. Accordingly, it is not surprising that a review of Mississippi district court decisions reveals that substantive and procedural unconscionability arguments have generally had little success in federal courts in this state.

Typical of Mississippi district court decisions on this issue is *Pridgen v. Green Tree Financial Servicing Corporation*, where Judge Barbour held that "mutuality of obligation is not required for a contract to be enforceable" and that an "arbitration clause is not unenforceable solely because it is one-sided."[398] Judge Wingate similarly held, in the 2005 decision of *New South Federal Savings Bank v. Anding*, that an arbitration agreement requiring the plaintiffs to arbitrate all disputes while allowing a bank to pursue certain actions in court was not unconscionable.[399] Other Mississippi district judges have issued holdings which closely track the logic of *Pridgen* and *Anding* and make it clear that proving either substantive or procedural unconscionability is quite difficult in Mississippi district courts.[400]

In light of the foregoing, it is not surprising that arbitration plaintiffs are so eager to bring FAA actions in federal court. Fortunately for them, it is not difficult for them to do so in the Fifth Circuit. Establishing diversity jurisdiction in an FAA case is made considerably easier for arbitration plaintiffs by the Fifth Circuit's 1994 decision of *Snap-On Tools, Inc. v. Mason*.[401] The Fifth Circuit held in *Mason* that the fact that non-diverse

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[398] Pridgen v. Green Tree Fin'l Servicing Corp., 88 F. Supp. 2d 655, 658-59 (S.D. Miss. 2000).

[399] New S. Fed. Sav. Bank v. Anding, 414 F. Supp. 2d 636, 643 (S.D. Miss. 2005).

[400] *See, e.g.* Murphy v. AmSouth Bank, 269 F. Supp. 2d 749, 752 (S.D. Miss. 2003) (rejecting plaintiffs' argument that arbitration agreement was unconscionable because it mandated arbitration of any of their claims while allowing arbitration defendant to use various court remedies); Family Financial Servs., Inc. v. Fairley, 173 F. Supp. 2d 565, 572 (S.D. Miss. 2001) (holding that "'mutuality of obligation is not required for a contract to be enforceable,' and an 'arbitration clause is not unenforceable solely because it is one-sided'"); Steed v. Sanderson Farms, Inc., 2006 WL 2844546 (S.D. Miss. 2006) (same).

[401] Snap-On Tools, Inc. v. Mason, 18 F.3d 1261, 1264 (5th Cir. 1994).

defendants who fell within the scope of an arbitration agreement were party defendants in an underlying state court action did not render them indispensable parties in a federal action to compel arbitration brought under the FAA. Accordingly, a foreign corporation sued in state court by a Mississippi resident may file a separate FAA action in federal court against that resident, assuming that the amount in controversy requirement is met. The corporation may do so even if there are non-diverse co-defendants in the underlying state court action, since those co-defendants are not considered indispensable parties to the arbitration action, under *Mason*.

It should also be noted that the power of FAA actions in the Fifth Circuit has been considerably expanded by the 2000 decision of *Grigson v. Creative Artists Agency*.[402] The Fifth Circuit held in *Grigson* that even non-signatories to an arbitration agreement may compel arbitration under its provisions under an equitable estoppel theory, where the plaintiff in the underlying state court action raises "allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract."[403] Accordingly, in a case where a plaintiff alleges concerted wrongdoing among three different defendants relating to a contract signed by the plaintiff containing an arbitration clause, each of these three defendants may compel arbitration under *Grigson*. Mississippi plaintiffs have frequently raised such allegations of concerted wrongdoing in their complaints, and *Grigson* has therefore proven to be of very considerable importance in expanding even further the impact of the FAA on litigation in this state.

Mississippi arbitration defendants have protested vehemently against what they see as unwarranted interference with state court proceedings based upon application of Mississippi state law which arguably differs from the application of the same law by Mississippi state courts. On the other hand, arbitration plaintiffs have argued that it is the

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[402] Grigson v. Creative Artists Agency, LLC, 210 F.3d 524, 526 (5th Cir. 2000).

[403] *Id.* at 527.

federal, rather than state, courts in Mississippi which have properly implemented the policy considerations behind the Federal Arbitration Act. While the policy arguments surrounding the increased role of arbitration in the Fifth Circuit will continue to be heated, there is little disputing the fact that litigants who have signed an arbitration agreement will usually find avoiding arbitration to be a very difficult task in Mississippi federal courts.

THE STRANGE AND UNFORTUNATE STORY OF JUDICIAL REVIEW OF INTERLOCUTORY AGENCY ACTION IN MISSISSIPPI

*James L. Robertson**

I. INTRODUCTION AND OVERVIEW

Appellate judicial review of interlocutory orders and judgments in Mississippi has had a curious and controverted life over the past quarter of a century. The story begins in 1984 with *Southern Farm Bureau Casualty Insurance Co. v. Holland*,[1] recognizing discretionary appellate review of interlocutory orders and judgments of lower courts. *Holland* was followed in short order by the original version of what is now Mississippi Rule of Appellate Procedure 5(a).[2] Mississippi Code Annotated

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[1] 469 So. 2d 55, 62-64 (Miss. 1984) (Anderson, J., concurring).

[2] MISS. R. APP. P. 5(a) (effective Jan. 1, 1995, MISS. R. APP. P. 5 replaced MISS. SUP.

§ 9-3-61[3] laid to rest that dimension of the interlocutory appeal authority controversy.[4] Judicial exasperation found in cases such as *Mississippi Farm Bureau Mutual Insurance Co. v. Parker*[5] and *Trustmark National Bank v. Johnson*[6] suggests a state of practical equilibrium has not yet emerged. Of late, the Supreme Court of Mississippi is widely perceived to be denying interlocutory review in many cases easily within the criteria of Rule 5(a).

Judicial review of interlocutory orders of administrative agencies was recognized in 1986 in *Sonford Products Corp. v. Freels*,[7] but five years later, the court did an about face in *Bickham v. Department of Mental Health*.[8] Sensible persons again saw curative powers in the 1996 enactment of Mississippi Code § 9-3-61. After all, the legislature there granted the supreme court authority to "prescribe . . . general rules . . . for appeals to the Supreme Court from *interlocutory or final* orders of . . . administrative boards and agencies."[9] Since court-made rules cannot create jurisdiction, § 9-3-61 seems a clear legislative recognition of the constitutional power of the courts to review interlocutory orders of administrative boards and agencies. Section 9-3-61 has been accepted as the legislative bootstrap necessary to support the previously promulgated Rule 5,[10] to the extent statutory authority may be seen as necessary in an area quite arguably within the court's rule-making power. One would have thought the same would hold for preexisting rules regarding judicial review of interlocutory orders of administrative boards and agencies, except where the

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[3] MISS. CODE ANN. § 9-3-61 (2002).

[4] Mound Bayou v. Johnson, 230 So. 2d 1212, 1221 (Miss. 1990) (Hawkins, J., dissenting); Owens-Illinois, Inc. v. Edwards, 573 So. 2d 704, 709-10 (Miss. 1990) (Hawkins, J., dissenting); Kilgore v. Barnes, 490 So. 2d 895, 896 (Miss. 1986) (Hawkins, J., dissenting).

[5] 921 So. 2d 260, 262 (Miss. 2005).

[6] 865 So. 2d 1148, 1152-53 (Miss. 2004).

[7] 495 So. 2d 468 (Miss. 1986).

[8] 592 So. 2d 96, 97 (Miss. 1991).

[9] MISS. CODE ANN. § 9-3-61 (2002) (emphasis added).

[10] MISS. R. APP. P. 5.

legislature has expressly denied such power of review. In the wake of *Cives Steel Co. v. Williams*[11] and, more recently, *Cunningham Enterprises, Inc. v. Vowell*,[12] we have a way to go before wooden doctrinaire resistance yields to legally permissible practical convenience and necessity.

I suggest the matter is of considerable importance. The public and private costs of outright denial of judicial review of interlocutory agency actions that satisfy one or more of the Rule 5(a) criteria outweigh any benefits that might be imagined from such denial. Just because a person or firm is ordinarily required to exhaust all administrative remedies before seeking judicial review does not mean that he must submit to exhaustion by the administrative process. The whole idea of the establishment of the Court of Appeals of Mississippi in January of 1995 was that many more than thirteen years would pass before the appellate judiciary again complained it was overworked. I will demonstrate below that when generally accepted modes of legal interpretation are brought to bear upon the valid legal texts in the field, they sweep away the prejudices of the past and the intra-judiciary practical prejudices of the present, and permit the appellate courts, within their sound discretion, to review judicially interlocutory orders of administrative agencies, save only for those cases where the legislature has spoken unmistakably to the contrary.

II. THE PRACTICAL PROBLEM

Demonstrably, public convenience and necessity require the power and practice of judicial review of agency action. One fundamental reason why this is so is that, for better or for worse, our boards and agencies not infrequently fail or refuse to bring to bear quality exhibitions of the expertise with which they have been legislatively charged to regulate our public affairs.[13] The reference here is to the technical expertise, the

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[11] 905 So. 2d 661, 671 n.1 (Miss. Ct. App. 2004).

[12] 937 So. 2d 32 (Miss. Ct. App. 2006).

[13] *See, e.g.*, McGowan v. Miss. State Oil & Gas Bd., 604 So. 2d 312, 323 (Miss. 1992) ("Our concern this day is that the Board has not exhibited its expertise.").

need for which in substantial part is the *raison d'etre* for the regulatory state *ab initio*. The problem is hardly limited to final agency actions. Indeed, it is a part of the problem that our appellate judiciary seems often not to see that finality in agency action is a far more elusive notion than in ordinary civil litigation.

There are problems at a broader level. Administrative judges and hearing officers, no less than trial judges themselves, often fail to state the bases for their rulings via an adequate record.[14] But that is just one dimension of a larger problem. Administrative judges and hearing officers, no less than trial judges, often fail to follow faithfully the three step process of adjudication, deciding discretely the material: (a) questions of law;[15] (b) questions of fact; and (c) the all important questions of law application, i.e., linking up the general with the particular.[16] The reason this three step process is so accepted and so necessary is that it is the surest stratagem known for holding to a minimum the number of erroneous adjudications, though it requires a bit more work than boilerplate orders. A recent and increasingly familiar exemplar recognizing the importance and utility of this trichotomy is the 2003 amendment to Rule 702 of the Mississippi Rules of Evidence. Faithful adherence to this accepted trichotomy forces the person making the adjudication to give the necessary attention to the material details.

The regulatory state is much with Mississippians, and our experience with the regulatory state creates the imperative for practical availability of judicial review, and not just at the end of the day. To be sure, our cumbersome structure and processes for that review can at times be as foreboding as the regulator himself. The regulator's powers over our lives suggest there are times when immediate judicial review may be all that stands between the citizen and ruin, or at least great and irremediable

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[14] *See* Trustmark Nat'l Bank v. Johnson, 865 So. 2d 1148, 1153 (Miss. 2004); Gavin v. State, 473 So. 2d 952, 955 (Miss. 1985).

[15] Where the trier of the facts is a jury, of course, the questions of law are decided by the trial judge.

[16] *See, e.g.*, Boardman v. United Servs. Auto. Ass'n, 470 So. 2d 1024, 1029 (Miss. 1985).

harm. An improvidently entered cease and desist order made at the outset of an administrative proceeding is a hopefully rare but nonetheless real exemplar. We put our heads in the sand if we ignore that the regulatory process is often by its nature more protracted, politicized, and, as fate would have it, at times less professional than traditional litigation in our courts. And so, the Mississippi Workers Compensation Commission (MWCC), for example, has recognized intra-agency interlocutory review according to the same criteria of Rule 5(a).[17] Common sense says those criteria are no less apt upon judicial review of the same interlocutory order. I suggest no case can be made that judicial review of interlocutory agency action should categorically be denied in cases that fall within the same general criteria as Rule 5(a) and/or the MWCC's *Big Star* ruling.

No doubt there are many times when interlocutory review would cause delay and add expense out of all proportion to the possible benefits to the parties, the system, or the public interest. There are times when it is hard to know on the front end whether the record available at the time interlocutory review is sought is adequate that the question tendered may be fairly and competently considered. These are but some of the reasons why thoughtful persons see public benefit in limiting interlocutory review to carefully categorized circumstances, and only within the sound discretion of the reviewing court. Even then we authorize interlocutory review with a touch of fear and trembling that there may at times be a slip twixt the cup and the lip in the exercise of that discretion. These quite rational concerns, however, can neither explain, much less justify, the near absolutist resistance seen in *Bickham, Cives Steel*, and *Cunningham Enterprises*.

A real case came to my attention a year or so ago that on its face cried out for acceptance of discretionary judicial review of interlocutory orders of administrative agencies.[18] A workers

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[17] *See* Hill v. Larson's Big Star Grocery & Commercial Union Ins. Co., MWCC No. 92-04373-E-6856 (Miss. Work. Comp. Comm'n Apr. 6, 1994) (post-1997 decisions available on Mississippi Workers Compensation Commission website, http://www.mwcc.state.ms.us/).

[18] *See* Thomas v. Gulf Coast Apparel Corp., 2006 WL 1057133, at *1 (Miss. Work.

compensation insurer asserted facially credible evidence that it had effectively cancelled its policy six months prior to an otherwise compensable injury. For non-payment of premiums, the carrier issued the required MWCC Form A-24 which was received by the employer on February 4, 1993, and by the MWCC on February 5, 1993. The carrier argued that the policy was effectively cancelled on March 8, 1993.[19] As fate would have it, a not insignificant and admittedly work connected injury occurred on October 6, 1993.

No sensible or fair minded person would, on the full facts of this case, deny compensation and medical benefits to the injured worker. Similarly, no sensible or fair minded person would say the compensation insurance carrier should pay those benefits if in fact it had legally, permissibly, and effectively cancelled its policy on March 8, 1993. The problem, of course, was that the same financial difficulties responsible for the employer's non-payment of premiums had also led to a failed business and bankruptcy. Reasonably prompt judicial review of the MWCC's interlocutory order *on its merits* was particularly important because any funds disbursed by the carrier were as a practical reality not subject to recoupment in the event the carrier's coverage cancellation defense were ultimately credited.[20] The injured claimant was just as broke as the employer. If the injured worker were to be relegated to unemployment compensation, social security disability benefits and Medicaid, and the other aspects of our woefully inadequate social safety net, that needed to be known by all reasonably early on. Avoiding transaction costs without a semblance of benefit or reimbursement was but one reason this was so.

Three times an administrative judge entered a facially incompetent order denying the coverage defense, fully offending the *Boardman* criteria noted above. Three times the MWCC rubber stamped the administrative judge order. Three times—on March 21, 2000, on July 15, 2003, and on February 2, 2007—

Comp. Comm'n Mar. 16, 2006).

[19] *See* MISS. CODE ANN. § 71-3-77(1) (2000); MISS. WORK. COMP. COMM'N GENERAL RULE 5.

[20] Cox v. S.B. Thomas Trust, 755 So. 2d 52, 52 (Miss. Ct. App. 1999).

the circuit court dismissed the carrier's application for judicial review because the MWCC order was interlocutory.[21] The case was then settled, the carrier never having had a court look at its facially credible defense, much less give a reasoned elaboration of whether that defense had merit. The point is not to argue pro or con regarding the merits of the policy cancellation defense. For present purposes, the reader should assume this a point where reasonable minds might well differ. And, to be fair, judicial review of interlocutory agency action in this case would not have cured all of the bungling in that case at the administrative and private levels. Judicial review would have authoritatively decided the point *at least* ten years before the case was finally resolved. This was almost as apparent on the front end as it is with the benefit of twenty-twenty hindsight. I am confident that the aggregate social costs of this one case, the private costs to the parties coupled with the transaction costs, are staggering relative to the benefits received, most of which could have been avoided if judicial review of interlocutory agency action had been allowed.

The case I speak of falls within one category of cases where, generally speaking, interlocutory review is recognized as socially acceptable, if not desirable, *viz.*, those where immediate review may "materially advance the termination of the litigation [or administrative proceedings] and avoid exceptional expense to the parties."[22] A dispassionate and competent adjudication of the policy cancellation defense would likely have been accepted by both parties and the matter resolved at least ten years before it was in fact settled!

The mind may readily imagine others. Questions of privilege, confidential communications, proprietary business information, trade secrets, and even self-incrimination arise from time to time within both regulatory and adjudicative proceedings within our agencies, boards, commissions, or

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[21] There is an MWCC Order entered March 16, 2006, *see Thomas*, 2006 WL 1057133, at *4-5, that is as disingenuous as it is incompetent, threatening the carrier with sanctions for seeking that which it never received–a competent adjudication of its coverage cancellation defense.

[22] *See* MISS. R. APP. P. 5(a)(1).

departments. As a matter of common sense, these are cases where a fallen Humpty Dumpty for better or for worse may not be restored.[23] The hopefully rare improvident cease and desist order, or suspension of a firm's license to do business, may cause a firm or business to close its doors, and lay off workers. Such cases fall within another category where, generally speaking, all recognize that interlocutory review ought to be available, *viz.*, those where immediate review "may protect a party from substantial and irreparable injury."[24]

Finally, there are cases where, for example, the legislature may establish a program and create an agency where there may be a *bona fide* question whether the legislative action was constitutionally permissible.[25] The agency might cite a regulated entity for a violation, and the party so cited may wish to challenge the entire program and process. Once the administrative process begins, it is ordinarily allowed to run its course.[26] While such challenges should be seen with the skepticism that should ordinarily be brought when the legislature has acted, there may indeed be cases of this sort where immediate review could "resolve an issue of general importance in the administration of justice."[27] The argument that the same question may be considered after a final order ignores the practical reality that the administrative processes cost time and money and the case will probably fall by the wayside before the final order stage is reached. If the question really is one "of general importance," then the public interest has been sacrificed on the alter of judicial reticence.

Sonford Products Corp. v. Freels[28] easily falls within two of these categories. The substantive question was whether a non-medical doctor toxicologist, if otherwise adequately qualified to give expert opinion testimony, could provide the "competent

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[23] *See, e.g., In Re* Knapp, 536 So. 2d 1330, 1333 (Miss. 1988).

[24] *See* MISS. R. APP. P. 5(a)(2).

[25] *See e.g.*, Albritton v. City of Winona, 178 So. 799 (Miss. 1938).

[26] *See* Middlesex County Ethics Comm'n v. Golden State Bar Ass'n, 457 U.S. 423, 436-37 (1982); Younger v. Harris, 401 U.S. 37 (1971).

[27] *See* MISS. R. APP. P. 5(a)(3).

[28] 495 So. 2d 468 (Miss. 1986).

medical proof" that the Act requires to show the causal link between the workplace injury and the claimant's disability.[29] The MWCC ruled that the claimant "failed to present medical evidence of causal connection,"[30] but remanded to the administrative judge for further proceedings. The circuit court affirmed "noting that no licensed physician" had provided the requisite "competent medical proof."[31] On further appeal, the supreme court held that the toxicologist was "qualified to give an opinion regarding . . . 'cause in fact' and should not be disqualified from testifying because his degree is a Ph. D. instead of an M.D."[32]

The supreme court noted, correctly, that the "remand by the commission to the administrative judge for further hearing . . . mak[es] this appeal an interlocutory one."[33] The court proceeded to the merits, noting a then "recent[] recogni[tion] that in exceptional circumstances appeals from interlocutory orders in the circuit court are warranted."[34] The court found the case within those circumstances sufficiently exceptional, as "this appeal, interlocutory in form, should be granted to avoid expense and delay."[35] This, of course, is the criteria now ensconced in Rule 5(a)(1) of the Mississippi Rules of Appellate Procedure.[36]

In the latter part of the twentieth century, employees experienced gradually developing injuries and occupational diseases as never before. Where properly proven, these are compensable.[37] Given the advent of the toxic workplace, the question in *Sonford Products* was one of general importance in the administration of industrial justice; moreover, nothing similar to Rule 5(a)(3) was on the books at the time. In the

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[29] MISS. CODE ANN. § 71-3-3 (2000).

[30] *Sonford Products*, 495 So. 2d at 470.

[31] *Id.* at 471.

[32] *Id.* at 473.

[33] *Id.* at 471.

[34] *Id.* (citing Kilgore v. Barnes, 490 So. 2d 894 (Miss. 1986)).

[35] *Id.* (citing *Kilgore*, 490 So. 2d at 895; S. Farm Bureau Cas. Ins. Co. v. Holland, 469 So. 2d 55, 63 (Miss. 1984) (Anderson, J., concurring)).

[36] MISS. R. APP. P. 5(a)(1).

[37] MISS. CODE ANN. § 71-3-3(b) (2000).

context of such out of the mainstream workplace injuries, and the apparent fact that many physicians possessing an M.D. simply might not be nearly so qualified to give opinion testimony as a person with a Ph.D. in toxicology, the *Sonford Products* question needed an answer. Any experienced appellate jurist or litigator knows that, time and again, denial of interlocutory review will mean that the case will be settled or dropped before the requisite level of finality can be reached. Generally, litigation is privately financed and administrative adjudicative processes are no different. Far more often than not, the private persons and firms who must bear the expense and experience of delay will simply say, in practical effect, however important this question may be, we simply cannot afford to be as public spirited as the final order rule would require. Loss of the opportunity for an authoritative and articulate answer to a question of public importance is a clear harm to the public interest.

Bickham v. Department of Mental Health involved two workers compensation cases in which separate circuit courts had accepted interlocutory appeals.[38] The cases were consolidated in the supreme court. *Bickham* overruled *Sonford Products*, offering a wooden string citation of cases past, the proverbial blunt instrument in a case where at the very least the surgeon's scalpel was called for.

> The extended time in which it takes to finally determine and conclude workers' compensation cases has long been a serious concern of the judiciary, especially this Court. Counsel for litigants and circuit judges should eschew any attempt to appeal a decision of the Commission which is not final.[39]

Bickham unmistakably holds that the power of judicial review of agency action lies only from final orders. *Bickham* was flawed when decided, in its decisional methodology, its rationale and its holding, and for reasons beyond those pointed out in the four-justice dissent.[40] For one thing, the five-justice majority ignored the "four decade experience" revealing a number of

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[38] 592 So. 2d 96 (Miss. 1991).

[39] *Id.* at 98.

[40] *Id.* at 99-103 (Robertson, J., dissenting).

contexts in which the courts had practiced interlocutory review of MWCC action, and without a hint of public disadvantage.[41] In each of the *Bickham* cases, a party sought to reopen a claim thought settled.[42] Where permitted, such may well set-off a whole new round of administrative adjudication. If, as a matter of law, one or the other of the *Bickham* claims should not have been reopened, surely it follows that these were cases where an "appeal, interlocutory in form, should be granted to avoid expense and delay."[43]

This dimension of *Bickham* points to a larger issue. Administrative processes differ from one-on-one, or even multiparty, civil litigation. Indeed, one of the reasons for administrative process in the first place is that some dimensions of problem solving require more that the familiar adversarial trial process. Compensation claims are more like litigation than most administrative claims. Consider the case of a casino license application. One early stage of the process is the casino site suitability decision. Whether certain sites are permissible has proven a matter of some contention in the years since the advent of the Mississippi Gaming Control Act. Many matters turn on whether a site is permissible, including, for example, environmental quality matters.[44] There is no way around the fact that a Gaming Commission site suitability determination is an agency action that is interlocutory in the traditional sense. How silly it would be to hold that judicial review of a site suitability ruling must await the final administrative decision whether the casino may be licensed to open its doors to conduct gaming operations!

Five years after *Bickham*, § 9-3-61 of the Mississippi Code Annotated added a further ground on which the *Bickham* holding might be eviscerated. Yet, there is something in the water that we drink that steels well-meaning and competent judges to resist a revision. *Cives Steel* and *Cunningham* make

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[41] *Id.* at 99-100 (Robertson, J., dissenting).

[42] *Id.* at 97 (majority opinion).

[43] Sonford Products Corp. v. Freels, 495 So. 2d 468, 471 (Miss. 1986).

[44] Concerned Citizens To Protect The Isles & Point, Inc. v. Miss. Gaming Comm'n, 735 So. 2d 368 (Miss. 1999).

this clear. To expose the flaws in the *Bickham* view of the world, a return to first principles is in order. Before doing that, however, it is important to have well in mind the less-than-perfectly-designed judicial infrastructure within which judicial review of agency action takes place.

III. THE SEVERAL LAYERS OF MISSISSIPPI COURTS THAT REVIEW AGENCY ACTION

For better or for worse, we function within a less than ideal amalgam of courts that review agency action. Generally speaking, the first round of judicial review is available in either the circuit courts or the chancery courts. For example, initial judicial review of agency action by the Mississippi Commission on Environmental Policy[45] and the Mississippi Oil and Gas Board,[46] to name but a few, is vested in the chancery courts. The Mississippi Sewage and Water Board,[47] the Mississippi Board of Real Estate Brokers,[48] the Mississippi Employment Security Commission,[49] and the Mississippi Workers Compensation Commission,[50] are but a few of the agencies whose actions are reviewable in the circuit courts. The Commission on Marine Resources is one agency, some of whose actions are subject to the review of the circuit courts,[51] while other actions are subject to review in the chancery courts.[52] The county courts share with the circuit courts judicial review of actions of the Department of Motor Vehicle Safety[53] and the Department of Public Safety-Weapons.[54]

The Supreme Court of Mississippi reviews directly some actions of the Mississippi Public Service Commission regulating

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[45] MISS. CODE ANN. § 49-17-41 (2003); MISS. CODE ANN. § 51-3-49 (2003).

[46] MISS. CODE ANN. § 53-1-39(a) (2003).

[47] MISS. CODE ANN. § 19-5-163 (2003).

[48] MISS. CODE ANN. § 73-35-25 (2004).

[49] MISS. CODE ANN. § 71-5-529 (2000); MISS. CODE ANN. § 71-5-513 (2000).

[50] MISS. CODE ANN. § 71-3-51 (2000).

[51] MISS. CODE ANN. § 49-15-67 (2003).

[52] MISS. CODE ANN. § 49-27-39(a) (2003).

[53] MISS. CODE ANN. § 63-15-7(2) (2004).

[54] MISS. CODE ANN. § 45-9-101(7)(b) (2003).

utility rates.[55]

A few statutes include language such as "in addition to other remedies otherwise available," or some such.[56]

Review of agency action in the circuit courts is governed procedurally by the Mississippi Uniform Rules of Circuit and County Court Practice (URCCC).[57] No uniform rules expressly govern review of agency action in the chancery courts. However, some chancery court districts have local rules in this regard.[58]

In 1993, the legislature enacted Mississippi Code Annotated §§ 9-4-1 to -17.[59] The advent of the court of appeals, which opened its doors for business in January of 1995, offered the potential for help.[60] There were many sensible reasons why the legislature should have provided that judicial review of all agency action be vested in the first instance in the court of appeals. The circuit and chancery courts were, are, and always will be ill-suited for judicial review of most agency action. Uniformity of decision from a court structured to consider questions of law on a formal record is infinitely more available in a single court of appeals. We all know of case after case where a public facility—a schoolhouse, a courthouse, a sewage treatment plant—over time has been found inadequate, and, usually for reasons of holding public expenditures to a minimum, we take the short-sighted approach of building on top of or adjoining the existing structure when a more far-sighted

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[55] MISS. CONST. art. VI, § 146.

[56] *See e.g.*, MISS. CODE ANN. § 17-17-45 (2003) (regarding the Bureau of Pollution Control); MISS. CODE ANN. § 31-3-23 (2005) (regarding the State Board of Public Contractors); MISS. CODE ANN. § 41-7-201 (2005) (regarding the Hospital Reimbursement Commission); MISS. CODE ANN. § 49-17-41 (2003) (regarding the Commission on Environmental Quality).

[57] MISS. R. CT. 5.01 to -.10, STATE 270-72 (West 2007).

[58] For example, see Local Rules for Fifth Chancery Court District, Rule 25. MISS. R. CT., STATE 515-16 (West 2007).

[59] 1993 Miss. Laws 654, ch. 518 (codified as amended at MISS. CODE ANN. §§ 9-4-1 to -17 (2002)).

[60] The short version of the story appears in James L. Robertson, *Constitutional Law*, *in* 3 ENCYCLOPEDIA OF MISSISSIPPI LAW 201-03 (Jeffrey Jackson & Mary Miller eds., 2001 & Supp. 2007). A longer and more satisfying version, albeit written after only the first year of the court of appeals, is Leslie H. Southwick, *The Mississippi Court of Appeals: History, Procedures & First Year's Jurisprudence*, 65 MISS. L.J. 593 (1996).

view cried out for a more fundamental structural revision. For better or for worse, the court of appeals was created without revising our first tier judicial review structure. And so the process remains, initial judicial review in the circuit, chancery or county court, as the case may be, followed by appeal to the Supreme Court of Mississippi, almost automatic deflection of the case to the court of appeals, followed finally by discretionary certiorari review back in the supreme court. However worthy the work of the court of appeals has been in civil and criminal appeals, the legislative effort gets at best a *D-* for the judicial review cop-out in its work product in chapter 518 of the 1993 Mississippi Laws.

IV. THE POWER OF JUDICIAL REVIEW

The Textual Foundation for Judicial Review of Interlocutory Orders of Administrative Agencies, Boards, and Commissions

"A party has no right of appeal, except insofar as it has been given by law."[61] The circuit courts of Mississippi have familiar original jurisdiction of civil and criminal matters, and "such appellate jurisdiction as shall be prescribed by law."[62] The chancery courts have equally familiar equity jurisdiction, and other jurisdiction conferred by the constitution,[63] "and such other jurisdiction, as is, in this chapter or elsewhere, provided by law."[64] The operative wording on each count is "by law," not "by statute." It is at times suggested that a right of appeal and/or the authority for judicial review is purely statutory.[65]

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[61] Gill v. Miss. Dep't of Wildlife Conservation, 574 So. 2d 586, 590 (Miss. 1991) (citing Fleming v. State, 553 So. 2d 505, 506 (Miss. 1989)).

[62] MISS. CONST. art. VI, § 156.

[63] MISS. CONST. art. VI, § 159.

[64] MISS. CODE ANN. § 9-5-81 (2004).

[65] *See, e.g.*, Miss. Gaming Comm'n v. Freeman, 747 So. 2d 231, 238 (Miss. 1999); Bickham v. Dep't of Mental Health, 592 So. 2d 96, 97 (Miss. 1991); Miss. Dep't of Corr. v. Smith, 883 So. 2d 124, 126 (Miss. Ct. App. 2004). The thesis that, in the case of agency action, "the means of appeal, its timing and other requirements, are purely statutory," is advanced in Leslie Southwick, *Administrative Law*, *in* 1 ENCYCLOPEDIA OF MISSISSIPPI LAW §§ 2:73, 2:88 (Jeffrey Jackson & Mary Miller eds., 2001 & Supp. 2007). That there are such statutes on the books hardly means that all is "purely statutory." With respect

This is too restrictive and proceeds from a failure to see sources of constitutionally acceptable judicial power in other forms of law, both those superior to statute law, *viz.*, constitutional law itself, and others inferior to statute law, *viz.*, judge-made law born of prudential considerations and, of course, always subject to legislative revision.[66] There is no express or implied constitutional imperative that the right of appeal or authority for judicial review may only be provided by statute.

The power of judicial review extends to the actions of administrative agencies.[67] This implicates the Separation of Powers mandate in the Mississippi Constitution.[68] Administrative agencies, such as the MWCC, the Mississippi Gaming Commission, the Mississippi Department of Transportation, or the Mississippi Public Service Commission, are within the executive department, while the circuit and chancery courts, with which we are primarily concerned here, are within the judicial department. Administrative agencies engage in adjudicative processes and these invariably involve the exercise of quasi-judicial powers. MWCC, for example, is charged with fact-finding functions and the making of awards that are rather obviously quasi-judicial. In these respects, and others as well, MWCC actions are subject to judicial review.[69] On the other hand, our agencies, boards, commissions, and departments do much more than administrative adjudication. In the case of MWCC, for example, the regulation of self-insureds, promulgation and administration of medical fee schedules, and the like are less like judicial functions and more like pure regulation.

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to my friend Judge Southwick, his view is unnecessarily grudging and demonstrably incomplete.

[66] By way of example, the federal judicial system for many years accepted and implemented the judge-made doctrine of pendent jurisdiction. In 1990, Congress refined the doctrine and renamed it supplemental jurisdiction. Pub. L. No. 101-650, § 310(a), 104 Stat. 5113 (codified as amended at 28 U. S. C. § 1367 (2006)).

[67] Robertson, *supra* note 60, at 32 n.12.

[68] *See* MISS. CONST. art. I, §§ 1, 2. For an overview of separation of powers in Mississippi, see Robertson, *supra* note 60, at 11-34 (particularly §§ 19:16, 19:17, 19:24).

[69] *See* Warren v. Miss. Workers Comp. Comm'n, 700 So. 2d 608, 618 (Miss. 1997); Walters v. Blackledge, 71 So. 2d 433, 440, 445-46 (Miss. 1954).

The central command of article I is that no officer of one department of government may perform a function at the core of a power that the constitution vests in one of the other two departments.[70]

> [The constitutional imperative for separation of powers in Mississippi contemplates that] if the encroachment be occasional and thought necessary for efficiency in government, and if the transgression be into an administrative matter with no inherent danger of enlargement, then the argument . . . that efficiency in government requires some overlapping has definite force.[71]

Judicial review of agency action is among the "checks and balances" that are the "[]other side to the coin labeled on the one side 'separation of powers.'"[72] The Supreme Court of Mississippi has properly cautioned that "the machinery of government would not work if it were not allowed a little play in its joints."[73]

At times it is implied, if not suggested outright, that the constitutional imperative that the executive and judicial departments of government be separate informs the judicial prerogatives on judicial review.[74] In a general sense, this is so. Any suggestion that separation of powers offers particulars regarding judicial review of interlocutory orders is but an incomplete syllogism, if not one made of whole cloth.

I am aware of no agency's actions that are not subject to judicial review, albeit there are differing processes and even different courts assigned to do the reviewing. The suggestion that "the need for a final order is universal,"[75] however, is just not so; at best it confuses the familiar with the necessary. The

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[70] Alexander v. State, 441 So. 2d 1329, 1345-46 (Miss. 1983).

[71] *Id.* at 1337.

[72] *Id.* at 1346.

[73] Dunn v. Love, 155 So. 331, 333 (Miss. 1934) (quoting City of Jackson v. Deposit Guar. Bank & Trust Co., 133 So. 195, 198 (Miss. 1931)).

[74] *See, e.g.*, Davis v. Pub. Employees' Ret. Sys., 750 So. 2d 1225, 1231-32 (Miss. 1999); Wilson v. Miss. Employment Sec. Comm'n, 643 So. 2d 538, 541 (Miss. 1994) (Banks, J., concurring).

[75] Southwick, *supra* note 65, at 101 (citing Bay St. Louis Cmty. Ass'n v. Comm'n on Marine Res., 729 So. 2d 796, 798 (Miss. 1998)).

crucial point often missed is that there is no constitutional text that has anything to say—one way or the other—about whether and to what extent judicial review of interlocutory agency action is permitted or limited. This is sufficiently clear that one wonders whence and why the doctrinaire insistence of some that all is "purely statutory" and that "the need for a final order is universal."[76] Arguably, the final order requisite that some find attractive might be provided by statute. On the latter point, the principal statute in the field is to the contrary, as it authorizes the supreme court to "prescribe . . . general rules . . . for appeals to the Supreme Court from *interlocutory or final* orders of . . . administrative boards and agencies."[77] Section 9-3-61 includes no express authority regarding interlocutory review of agency action in the circuit or chancery courts. Nor does § 9-3-61 preclude such review or the making of rules regarding such review. There is no express mention of such review one way or the other. Since the authority conferred by § 9-3-61 covers the making of rules that will enable "interlocutory . . . orders of . . . administrative boards and agencies" to be reviewed in "the Supreme Court," conventional statutory interpretation teaches us that this authority extends to such rule-making as may be necessary to get such cases from the agency to and through the circuit or chancery court, as the case may be, and then on to "the Supreme Court." On other points of legal interpretation implicated here, all participants in the debate must look to more general sources, for that is all there is.

One general constitutional text seems quite consistent with—if not supportive of—discretionary judicial review of

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[76] A glance across Mississippi's eastern boundary affords a good beginning to realizing that the final order rule is hardly "universal." In Alabama "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." ALA. CODE § 41-22-20(a) (2007). Many other states permit judicial review of interlocutory agency action. *See, e.g.*, CONN. GEN. STAT. ANN. § 4-183(b) (2008); FLA. STAT. ANN. § 120.68(1) (West 2008); IOWA CODE ANN. § 17A.19(1) (West 2008); MD. CODE ANN. STATE GOV'T § 10-222(b) (West 2007); R.I. GEN. LAWS § 42-35-15(a) (2007). In the federal system, exhaustion and finality doctrines are "subject to pragmatically based exceptions similar to the exceptions to the prohibition against appeals of interlocutory orders of trial judges." II RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW § 15.2, at 969 (4th ed. 2002).

[77] MISS. CODE ANN. § 9-3-61 (2002) (emphasis added).

interlocutory orders of administrative agencies in cases where a party will suffer demonstrable detriment without such interlocutory review. I refer to the remedy clause of article III, § 24 of the Mississippi Constitution, i.e., "every person" is assured that "for an injury done [to] him in his lands, goods, person or reputation, [he] shall have [a] remedy by due course of law." The remedy clause is purely procedural, the fantasies of some to the contrary notwithstanding.[78] The remedy clause affords a right to be heard in a general sense.[79] Defendants and third persons are among "every person" and are as entitled as plaintiffs to such procedural "remedies" as will let them through the courthouse door. There is no reason to doubt that legal persons such as corporations are "persons" the same as natural persons. One's money is within his "goods." Recall that actions for judicial review partake of original actions in the circuit or chancery court. Separation of powers makes it so. A questionable agency action is fairly seen within "an injury done."

To be sure, the remedy clause of § 24 does not in and of itself confer the power of judicial review of interlocutory agency action. Still, like so much else in any constitution or other public legal text, the remedy clause provides "principle[s] from which to reason."[80] Where, as here, other law-making authorities—primarily the legislature but not insignificantly the courts through their inherent rule-making authority—have acted, they can and should point to § 24 as providing a constitutional principle being implemented. In this sense, the spirit if not the letter of the remedy clause supports the idea that some catch-22s and Kafkaesque nightmares within the legal process really can, and therefore should, be avoided, and our tribunals should open their minds to the options no law puts off limits. If, as here, it takes judicial review of interlocutory orders of administrative agencies to afford a person a practical opportunity to secure redress "for an injury done to him in his lands, goods," then it seems sensible that such review be

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[78] Robertson, *supra* note 60, at 120.

[79] Section 24 and the remedy clause are construed the same as other constitutional guarantees. *See* Robertson, *supra* note 60, at 36-39.

[80] McCluskey v. Thompson, 363 So. 2d 256, 264 (Miss. 1978).

regarded as a procedural "remedy by due course of law," to which he is entitled. Again, it need be made clear that no outcome is assured; only a process is made available.

The "appellate jurisdiction" of the circuit courts "prescribed by law" includes the authority of judicial review of the actions of many state administrative entities.[81] Orders entered by the MWCC are among these.[82] Section 71-3-51 speaks of the "final award," but attention must be paid to the text the legislature has given us as the statute reads, "[t]he final award of the commission shall be conclusive and binding unless" either party perfects an "appeal therefrom to the circuit court," and "[s]uch an appeal may be taken by filing notice of appeal." Section 71-3-51 authorizes "appeals" from a "final award of the commission." But nothing in § 71-3-51 precludes "appeals" from any other category of award, such as a temporary compensation award or other interlocutory order. *Blankenship v. Delta Pride Catfish, Inc.*,[83] is simply wrong when it says otherwise, as any high school English teacher looking at the text of § 71-3-51 for five seconds could have seen.[84] The fair reading is that § 71-3-51 is silent regarding judicial review of other actions of the MWCC. Seeing this leads us to another familiar prejudice. If the legislature had wished the circuit courts to have the power to review interlocutory orders as well as final awards of the MWCC, it could have explicitly granted this power in the text of the legislation. This illicit notion proceeds from and falls in the face of "the familiar fallacy of the omniscient, indefatigable legislature."[85]

Even without § 71-3-51, a circuit court has authority to review orders of the MWCC under § 11-51-95 of the Mississippi Code.[86] The MWCC is hardly the only agency whose actions are

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[81] URCCC 5.02 recognizes that circuit courts hear appeals from "state and local administrative agencies."

[82] MISS. CODE ANN. § 71-3-51 (2000).

[83] 676 So. 2d 914 (Miss. 1996).

[84] *Id.* at 916.

[85] *See* James L. Robertson & David W. Clark, *The Law of Business Torts*, 15 MISS. C. L. REV. 13, 46-47 (1994).

[86] Mississippi Code § 11-51-95 authorizes the circuit courts to hear matters from lower courts and authorities by way of the procedural device of a writ of certiorari.

subject to judicial review under § 11-51-95.[87] There is no textual or normative reason to limit "judgments of all tribunals inferior to the circuit court" within § 11-51-95 to those judgments that are "final" in the technical legal sense, although ordinarily that could and should be the case. For those who cling to the idea that some statute is necessary for judicial review of agency action, §§ 11-51-93 & -95 more than satisfy such concerns.

It is true that certiorari review is confined to "questions of law arising or appearing on the face of the record and proceedings,"[88] but so is direct review under § 71-3-51 and the Mississippi Uniform Rules of Circuit and County Court Practice.[89] The verbiage may be a bit different; nonetheless, each of the four criteria for review found in Rule 5.03 fits easily within "questions of law arising or appearing on the face of the record and proceedings." The open mind discerns no practical or functional difference between judicial review of agency action under that agency's "direct appeal" statute and certiorari review under §§ 11-51-93 & -95, except that certiorari review is thought somehow more discretionary.

There are other contexts in which judicial review of agency

Southwick, *supra* note 60, at 99. The nomenclature has not mattered at least since January 1, 1982. *See* MISS. R. CIV. P. 2.; Dye v. State, 507 So. 2d 332, 337-38 (Miss. 1987) (proceeding for a writ of quo warranto treated as a complaint, given the unitary civil action created by Rule 2); Hobgood v. Koch Pipeline S.E., Inc., 769 So. 2d 838, 840-41 (Miss. Ct. App. 2000) (indicating so long as appeal taken within time permitted for interlocutory appeals, failure to label the appeal "interlocutory" was not fatal). Moreover, in Mississippi practice, it has never been deemed necessary tnat the jurisdictional basis be set forth specifically in the initial pleading of the initiating party, so long as jurisdiction may be shown, if challenged. As noted, there certainly is a sense in which an action for judicial review of an order of the MWCC, or any other administrative agency for that matter, is an original action governed by Rule 2 and certainly by the URCCC, notwithstanding the entrenched habit of lawyers and courts referring to those proceedings as appeals.

[87] *See, e.g.*, Smith v. Univ. of Miss., 797 So. 2d 956, 959-60 (Miss. 2001) (reasoning a university hearing panel is an inferior tribunal whose actions are subject to judicial review in circuit court); Gill v. Miss. Dep't of Wildlife Conservation, 574 So. 2d 586, 590-91 (Miss. 1990) (indicating the Employee Appeals Board is a "tribunal[] to the circuit court" as contemplated by Mississippi Code § 11-51-95); Miss. Dep't of Corr. v. Smith, 883 So. 2d 124, 126-27 (Miss. Ct. App. 2004) (recognizing judicial review of decision of the Employee Appeals Board).

[88] MISS. CODE ANN. § 11-51-93 (2002); *see also Gill*, 574 So. 2d at 591.

[89] URCCC 5.03; MISS. CODE ANN. § 71-3-51 (2006).

action is permissible and takes place outside the "direct appeal" process that may be provided by statute. For example, persons may secure judicial review of agency action through an action for an injunction[90] and other relief.[91] Moreover, questions of the timing of appeals are within the judicial power, legislative enactments to the contrary notwithstanding.[92]

Judicial review of agency action is always subject to non-jurisdictional limits. Mississippi Uniform Rule of Circuit and County Court Practice 5.03 sets forth the four and only criteria for judicial review of agency action. This reluctance of the courts is certainly a function of inter-department respect deriving from considerations of separation of powers, and, as well, of practical limits of judicial competence.[93] From these premises, familiar duties of judicial deference have emerged.[94] On judicial review, courts defer to administrative agencies, boards, commissions, or departments and the constructions they give to statutes those agencies, boards, commissions, or departments are charged to administer and enforce.[95] "Deference is at its healthiest when it is firmly rooted in a 'formal issuance from the agency, such as a[n] . . . administrative adjudication,'"[96] if only the agency will

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[90] Southwick, *supra* note 65, at 99-100.

[91] MISS. CODE ANN. §§ 11-13-1 to -39 (2004); *see, e.g.*, Prisock v. Perkins, 735 So. 2d 440, 443 (Miss. 1999); State Tax Comm'n v. Fondren, 387 So. 2d 712, 724 (Miss. 1980); Fondren v. State Tax Comm'n, 350 So. 2d 1329, 1334 (Miss. 1977). The *Fondren* cases suggest that my friend Judge Southwick is incorrect when he treats injunctions and direct appeals [and certiorari] as mutually exclusive judicial review remedies. Southwick, *supra* note 65, at 100.

[92] *See, e.g.*, Duncan v. St. Romain, 569 So. 2d 687 (Miss. 1990).

[93] *See e.g.*, McGowan v. Miss. State Oil & Gas Bd., 604 So. 2d 312, 322-24 (Miss. 1992).

[94] Davis v. Public Employees Ret. Sys., 750 So. 2d 1225, 1231-32; Gill v. Miss. Dep't of Wildlife Conservation, 574 So. 2d 586, 593 (Miss. 1990).

[95] *See, e.g.*, Titan Tire of Natchez v. Miss. Comm. On Env. Quality, 891 So.2d 195, 200 (Miss. 2004); Elec. Data Sys. Corp. v. Miss. Div. of Medicaid, 853 So. 2d 1192, 1202 (Miss. 2003); Smith v. Univ. of Miss., 797 So. 2d 956, 959 (Miss. 2001) ("[T]he Circuit Court and Supreme Court afford great deference to an administrative agency's construction of its own rules and regulations and the statutes under which it operates."); Grant Ctr. Hosp. of Miss., Inc. v. Health Group of Jackson, Inc., 528 So. 2d 804, 808 (Miss. 1988). Southwick, *supra* note 65, at 119-20.

[96] Miss. Gaming Comm'n v. Six Elec. Video Gaming Devices, 792 So. 2d 321, 329 (Miss. Ct. App. 2001). Southwick, *supra* note 65, at 122.

"exhibit[] its expertise."[97] The practical limits of judicial competence, of course, vary with the nature of the question. Whether and to what extent an injured worker suffers a permanent partial occupational disability is best decided by the MWCC as a function of its "everyday experience[s] . . . giv[ing] it [a] familiarity with the particularities and nuances of the problems committed to its care which no court can hope to replicate."[98] On the other hand, whether a notice of cancellation of a workers compensation insurance policy satisfies the thirty-day advance notice requirement of § 71-3-77(1) of the Mississippi Code is a bit more elementary, and, to the point, within the ordinary fare of the courts.

From the foregoing general perspectives, and with deference to those who in good faith do not agree, the existence of discretionary authority—jurisdiction, if you will—of judicial review in the circuit court to consider on the merits interlocutory agency action is clear. If nothing else, in the case I discuss above, on March 21, 2000, and again, on July 15, 2003, and again, on February 2, 2007, the circuit court had authority and jurisdiction under §§ 11-51-93 & -95 of the Mississippi Code to do so. The constitutional policy premises embedded in and emanating from the remedy clause of article III, § 24 of the Mississippi Constitution supported the sound exercise of that discretionary authority in favor of judicially reviewing the orders of the MWCC. *Bickham v. Department of Mental Health*[99] remains on the books. Yet, its vitality has been cut off at the knees by § 9-3-61, notwithstanding that *Cunningham Enterprises, Inc. v. Vowell*[100] would call this into question.[101] Continued adherence to *Bickham* fails in the court of common sense as well. *Big Star* permits intra-agency review of an

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[97] *McGowan*, 604 So. 2d at 323 ("Our concern this day is that the Board has not exhibited its expertise."). Southwick, *supra* note 65, at 122.

[98] Dunn v. Miss. State Dep't of Health, 708 So. 2d 67, 72 (Miss. 1998) (quoting *Gill*, 574 So. 2d at 593).

[99] 592 So. 2d 96 (Miss. 1991).

[100] 937 So. 2d 32 (Miss. Ct. App. 2006).

[101] *See* Cives Steel Co. v. Williams, 905 So. 2d 661, 671 n.1 (Miss. Ct. App. 2004) (Southwick, J., dissenting).

interlocutory order of an MWCC administrative judge. If that same order, or MWCC's agency action upon it, were reviewed in the circuit court, perhaps under § 11-51-95, URCCC 5.03 or otherwise, Rule 5(a) would permit further review in the supreme court or, by deflection, in the court of appeals.[102] In this context, it makes no sense that *Bickham* remains as a bar, in the absence of superior law mandating such.

V. THE POWER AND BREADTH OF THE SUPREME COURT'S INHERENT RULE-MAKING POWER

The judicial power of the supreme court includes rule-making power that emanates from article VI, § 146 of the Mississippi Constitution. The rule-making power is inherent in the supreme court.[103] "The inherent powers of a court are such as a result from the very nature of its organization, and are essential to its existence and protection, and to the due administration of justice."[104] The rule-making power requires no legislative enactment as a predicate to its exercise.[105] Nor is its exercise limited to formal codes of rules adopted following the rule-making processes of the Rules Advisory Committee, such as the Mississippi Rules of Civil Procedure, Rules of Evidence, and Rules of Appellate Procedure, or, as here, the Mississippi Uniform Rules of Circuit and County Court Practice, which had been recommended by the Conference of Circuit and County

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[102] I am aware that some would argue that the circuit court's order would be final in the sense that it disposed of all that was then before the court; hence, there would be no occasion to consider the interlocutory appeal question. That such a view inappropriately exalts form over substance should be readily apparent to thoughtful persons. Further review by the supreme court or the court of appeals would be de novo as to the circuit court but with deference as to the MWCC. Such further review would still be of an MWCC order that did not finally dispose of the claim for compensation.

[103] The nature and sources of the rule-making power in this state are set forth in some detail in *Hall v. State*, 539 So. 2d 1338, 1344-46 (Miss. 1989). *See* James L. Robertson, *Discovering Rule 11 of The Mississippi Rules of Civil Procedure*, 8 MISS. C. L. Rev. 111, 114-15 (1988).

[104] *See, e.g.*, James L. Robertson, *Subject Matter Jurisdiction*, *in* 1 MISSISSIPPI CIVIL PROCEDURE 26-27 (Jeffrey Jackson ed., 2006) (citing Fuller v. State, 57 So. 806 (Miss. 1912)).

[105] For a more in depth discussion see *Newell v. State*, 308 So. 2d 71, 78 (Miss. 1975), and its progeny.

Judges.

Rules may be adopted as a part of a specific decision.[106] Rules may emanate from authoritative precedential holdings.[107] A relatively recent example regards non-resident amenability to process.[108] Long established examples of non-codified rules are as diverse as the doctrine of collateral estoppel which, when you think about it, is nothing more than a rule of evidence, albeit not found within the formal Mississippi Rules of Evidence,[109] and the rule that a non-resident not otherwise amenable to suit in Mississippi enjoys immunity from civil process when he appears here as a party or a witness.[110]

Section 9-3-61 does two things that are important here. First, it impliedly recognizes that "appeals . . . from interlocutory . . . orders of . . . administrative boards and agencies" are constitutionally jurisdictionally permissible, albeit that specific authority therefore must be found in other law (but not necessarily statutory law), and that nothing in separation of powers suggests to the contrary. Second, it expressly ratifies the premise that "appeals . . . from interlocutory . . . orders of . . . administrative boards and agencies" are proper subjects for the court's exercise of its constitutionally grounded, inherent rule-making "judicial power." *Bickham*-created doubts were thereupon removed.[111] Section 9-3-61 provides that the supreme court has authority to regulate by rule review of interlocutory or final orders of all administrative agencies which, of course,

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[106] Hudspeth v. State Highway Comm'n, 534 So. 2d 210, 213 (Miss. 1988) (amending MISS. R. EVID. 601).

[107] In *Alexander v. Alexander*, 493 So. 2d 978 (Miss. 1986), I suggested "in the not too distant future, that this Court employ its rule making power and either through the vehicle of a series of rules generally promulgated enforceable in all chancery courts or perhaps pendant to the decision of an appropriate case and set forth just and equitable procedures for the administration of the Irreconcilable Differences Divorce Act of 1976." *Id.* at 981-82 (Robertson, J., concurring).

[108] Jones v. Chandler, 592 So.2d 966, 970-71 (Miss. 1991).

[109] *See, e.g.*, State v. Oliver, 856 So. 2d 328, 331 (Miss. 2003); Royal Oil Co. v. Wells, 500 So. 2d 439, 445 (Miss. 1986).

[110] Chenier v. Chenier, 573 So. 2d 699, 703-04 (Miss. 1990).

[111] I note but see no need to discuss in this context two post-*Bickham* but pre-July 1, 1996, cases, *Blankenship v. Delta Pride Catfish, Inc.*, 676 So. 2d 914 (Miss. 1996), and *Wilson v. Miss. Employment Sec. Comm'n*, 643 So. 2d 538 (Miss. 1994).

includes the MWCC.[112]

The compensation case I have referred to here concerned applications to the circuit court for judicial review of interlocutory agency actions, not further review in the supreme court or, by deflection, in the court of appeals. Once jurisdiction is settled, and authority to make and enforce procedural rules is in place, such review is a function of URCCC 2.02 and URCCC 5.01 to -.10.[113] These rules are enforceable because each has been made under the supreme court's rule-making authority, effective May 1, 1995.[114]

Judge Southwick's five-judge concurrence in *Cunningham* asserts that "[t]he court rules controlling appeals from agencies . . . to the circuit courts, which is the route that workers' compensation cases proceed, do not refer to interlocutory appeals."[115] In a strained linguistic sense this is true, but the point proves too much, for these rules do not refer to "final" orders or judgments either, as proper subjects for judicial review or appeal. Five usages of "order or judgment"[116] are found within URCCC 5.01 to -.10. None of these five usages is accompanied by an adjective telling us whether the rule is referring to appeals or applications for judicial review, as the case may be, of "interlocutory" orders or "final" orders or judgments. Rather, "order or judgment" are the stand alone words used for describing that from which an appeal or judicial review governed by URCCC 5.01 to -.10 is taken.

Nothing in the text of any of these rules affords grounds for

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[112] *See* JOHN R. BRADLEY & LINDA A. THOMPSON, MISSISSIPPI WORKERS COMPENSATION § 8:8 (2007).

[113] The reference here, of course, is to Mississippi Uniform Rules of Circuit and County Court Practice, as those rules appear in the State Mississippi Rules of Court. MISS. R. CT., STATE 263, 270-72 (2006).

[114] *See* Re: Uniform Rules of Circuit and County Courts, Order Miss. Supreme Court No. 89-R-99025 (June 8, 1994).

[115] Cunningham Enters. v. Vowell, 937 So. 2d 32, 34 (Miss. Ct. App. 2006) (Southwick, J., concurring).

[116] *See* URCCC 5.03 ("the order or judgment of the lower authority"); URCCC 5.04 ("the lower court or lower authority whose order or judgment is being appealed;" "within thirty (30) days of the entry of the order or judgment being appealed;" and "must designate the judgment or order from which the appeal is taken"); URCCC 5.08 ("not any other part of the order or judgment").

arguing that interlocutory orders are excluded. Indeed, the disjunctive usage in "order or judgment" counsels to the contrary. This is particularly so when we have in mind the familiar rule of legal textual interpretation that, where possible, meaning should be attributed to each word or phrase within the text.[117] There is no basis here for any assumption that "order or judgment" was just another instance of lawyers refusing to use one word when two or three will do just as well. The judicial act that ends a case is normally thought of as a "judgment."[118] More often than not, a judicial act labeled as an "order" is interlocutory. In administrative adjudicative parlance, the term "order" is often used to label both interlocutory and final agency action. "Order or judgment," as applied in the present context means interlocutory or final agency action, absent express text providing otherwise. There is no such other text in URCCC 5.01 to -10.

An independent point of consequence is the elementary premise of legal drafting that nouns (orders) stated without limitation do not need adjectives ("interlocutory" or "final") for their legal or linguistic meaning to be established, the lawyer's addiction to adjectives (and adverbs) to the contrary notwithstanding.

URCCC 2.02 coupled with URCCC 5.01 to -.10 by their text authorize and govern judicial review of agency orders without limiting that authority to final orders. URCCC 2.02 coupled with URCCC 5.01 to -.10 were promulgated by the Supreme Court of Mississippi effective May 1,1995, within its judicial power grounded in article VI, § 144 of the Mississippi Constitution. Section 9-3-61 merely recognized this grounding and removed the road block *Bickham* had placed in the path of *Sonford Products*. As that path was also predicated upon the

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[117] Gilmer v. State, 955 So.2d 829, 835 n. 1 (Miss. 2007) (statute should be read so as to "give[] effect to the plain meaning of each word and phrase in the statute"); *cf.* Kelso v. McGowan, 604 So.2d 726, 730 (Miss. 1992) ("each word and clause throughout entire instrument should be reconciled and given meaning if reasonably possible") (citing Harris v. Griffith, 210 So. 2d 629 (Miss. 1968)); Tinnin v. First United Bank of Mississippi, 502 So.2d 659, 665 (Miss. 1987) (will to be "construed as a whole with each part, each phrase, each word given effect, if that be possible").

[118] *See* MISS. R. CIV. P. 58.

"judicial power," it would be foolhardy to suggest that the supreme court had to go back and repromulgate URCCC 2.02 and 5.01 to -.10. A statute may be saved by constitutional authorization legally effective after enactment of the statute,[119] and, on principle, so may a rule made before the effective date of a statute that may authorize it.[120]

The Further Foundation for Judicial Review of Interlocutory Orders, of Administrative Agencies, Boards, Commissions, and Departments

It must be conceded that there is no statute stating in so many words that "circuit courts within their discretion may hear applications for judicial review of interlocutory orders of the MWCC and decide those applications on their merits." Because this is so, doubting Thomases may ask to be shown why the legal texts noted above—constitutional provisions, statutes, rules, case law—should be construed, individually and/or in some combination, so as to permit such judicial review of interlocutory orders of the MWCC. The answer is a function of a fair consideration of the legal texts noted above from the standpoint of principle and policy, in the context of the interpretive stratagem I have presented and defended elsewhere.[121] This interpretive stratagem is well within the mainstream of the customs and norms of American legal practice.

i. Matters of Principle

As a matter of principle, the point has several dimensions. First, there are a number of jurisdiction-creating doctrines that have filled the interstices in our law of subject matter jurisdiction, usually arising as a matter of constrained prudential and practical necessity. As this is so, it follows as a matter of principle that this judicial prerogative of so filling the interstices extends to other areas of prudential and practical

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[119] Burrell v. State Tax Comm'n, 536 So. 2d 848, 854 (Miss. 1989).

[120] Wolfe v. City of D'Iberville, 799 So. 2d 142, 146 (Miss. Ct. App. 2001).

[121] *See, e.g.*, Robertson & Clarke, *supra* note 85, at 24-57.

necessity, as those matters are seen. Of course, the courts should be careful and restrained and be sure of their premises before they act. Of course, the legislature has the prerogative of saying to the courts that they have gone too far in finding new interstitial jurisdiction.

One important, if less familiar, but at times more necessary, instance of formally unauthorized jurisdiction is jurisdiction to determine jurisdiction.[122] "Every court has jurisdiction to determine its own jurisdiction, as a function of its inherent powers."[123] The court must have the authority to decide authoritatively that it has no authority to decide the merits of each case. Yet there is no escaping that this authority is granted in no clause of the constitution, nor in any statute enacted thereunder.

Most familiar is the doctrine of pendent jurisdiction.[124] Nothing in the constitution expressly authorizes pendent jurisdiction. No act of the legislature creates pendent jurisdiction in our circuit and chancery courts. Yet no one doubts the validity of pendent jurisdiction, notwithstanding our continuing debates at its edges. We have more constitutional authority undergirding discretionary judicial review of interlocutory orders of administrative agencies, given the remedy clause of article III, § 24 of the Mississippi Constitution, than we find supporting pendent jurisdiction. We also have more statutory authority undergirding discretionary judicial review of interlocutory orders of administrative agencies, given § 11-51-95 of the Mississippi Code, than we find supporting pendent jurisdiction.

There is a point of history that is important. For many years, pendent jurisdiction was a one-way street. Chancery courts had pendent jurisdiction to hear common law claims, but circuit courts were not allowed to hear equity claims. In such instances, the parties were relegated to the chancery court for a

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[122] *See, e.g.*, Robertson, *supra* note 104, at 26-27; Cives Steel Co. v. Williams, 905 So. 2d 661, 671 n.1 (Miss. Ct. App. 2004).

[123] Robertson, *supra* note 104, at 26 (citing U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988)).

[124] *See, e.g., id.* at 60-65.

separate hearing of the equitable claims.[125] In time this was seen to cause a great inconvenience. The old system allowed a party getting to the chancery court first to strip his or her opponent of their right of trial by jury otherwise guaranteed in article III, § 31 of the Mississippi Constitution. From humble origins in *Hall v. Corbin*[126] through *McDonald v. Holmes*,[127] we have reached the point where "it is more appropriate for a circuit court to hear equity claims . . . since circuit courts have general jurisdiction."[128] This resulted from the fact that the courts had the courage to fill these particular interstices in our law of subject matter jurisdiction, as a matter of constrained prudential and practical necessity. The same rules apply to judicial review of interlocutory orders of the MWCC and other administrative agencies, except where the legislature has expressly forbade it.

There is a second dimension. The authority to hear interlocutory appeals abounds in all courts possessing appellate jurisdiction, from orders of lower courts and administrative agencies.[129] At this point the rule of relevant resemblances sets in.[130] The question becomes, on principle, what is it about interlocutory orders of administrative agencies, as a practical matter, that materially differs from other orders, including interlocutory orders, of trial courts, which are clearly subject to discretionary interlocutory review, such that there is adequate justification for an altogether different rule. I contend the answer is simply nothing.

The MWCC has made this point far more powerfully than I could. The MWCC has determined that *it* may choose to review interlocutory orders of its administrative judges,

> [W]here such review may materially advance the final

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[125] *Id.* at 61.

[126] 478 So. 2d 253 (Miss. 1985).

[127] 595 So. 2d 434 (Miss. 1992).

[128] Robertson, *supra* note 104, at 63, n.11.

[129] MISS. CODE ANN. § 9-3-14 (2002); MISS. R. APP. P. 5(a).

[130] *See* Harrison County Bd. of Supervisors v. Carlo Corp., 833 So. 2d 582, 583 (Miss. 2002) (citing McGowan v. Miss. State Oil & Gas Bd., 601 So. 2d 312 (Miss. 1992)); *see also* Windham v. State, 602 So. 2d 798, 807 (Miss. 1992) (Robertson, J., concurring).

> resolution of the claim, avoid unnecessary delay or expense to the parties, protect a party from substantial and irreparable injury, resolve an issue of general importance in the administration of the Mississippi Workers' Compensation Act, or serve some other purpose that the Commission in the exercise of its sound discretion considers appropriate.[131]

The 1996 enactment of § 9-3-61, seen narrowly, provides the statutory authority which the *Bickham* majority found lacking. But § 9-3-61, like any other statute, is "received . . . into the body of the law both as a rule to be applied and a principle from which to reason."[132] The scope of the principle is enhanced by the remedy clause of the Mississippi Constitution, as noted above.[133] This broader context is enhanced historically by the continued validity and enforcement of Rule 5(a),[134] even through the *Bickham*-darkened early 1990s. Rule 5(a) was valid and enforceable because of the court's inherent authority, as were the rest of what were then known as the Mississippi Supreme Court Rules, now codified as the Mississippi Rules of Appellate Procedure. Rule 5(a) never ceased to be valid and enforceable between *Bickham* in 1991 and the enactment of § 9-3-61 in 1996. As that was so, *Bickham*'s five-justice majority never rested on a foundation firmer than quicksand. The 1996 enactment of § 9-3-61 simply removed any doubt of the premise. On the same reasoning, URCCC 5.01 to -10 have been valid and enforceable since they were promulgated.

Moreover, when § 71-3-51 speaks of the "final award," and authorizes an "appeal" to the circuit court without any

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[131] Hill v. Larson's Big Star Grocery, MWCC No. 92-04373-E-6856 (Miss. Work. Comp. Comm'n Apr. 6, 1994); *see, e.g.*, Prince v. Burlington Indus., Inc., No. 9809326-G-3339-D, 2007 WL 2077605, at *1 (Miss. Work. Comp. Comm'n July 11, 2007); Prophet v. Blackwell Chevrolet, No. 02-03479-H-9502, 2006 WL 2613931, at *1 (Miss. Work. Comp. Comm'n Aug. 9, 2006); Mills v. Hercules, Inc., No. 0001965-G-7667, 2000 WL 1665251, at *4 (Miss. Work. Comp. Comm'n Oct. 16, 2000); *see also* Cunningham Enters., Inc. v. Vowell, 937 So. 2d 32, 33 (Miss. Ct. App. 2006).

[132] McCluskey v. Thompson, 363 So. 2d 256, 264 (Miss. 1978); *see also* J. L. Teel, Inc. v. Houston United Sales, 491 So. 2d 851, 857 (Miss. 1986).

[133] For that matter, the remedy clause itself enacts "a principle from which to reason." *McCluskey*, 363 So. 2d at 264.

[134] MISS. R. APP. P. 5(a).

limitation of that right to a "final award," that statute too becomes "a principle from which to reason."[135] This is especially so, given the absence of any wording in § 71-3-51 which would preclude judicial review of interlocutory orders. Principle commands that similar matters be treated similarly, and that differing matters be treated appropriately differently by reference to the extent and degree of difference. Because interlocutory orders are different from final orders or awards, and in important ways, § 71-3-51 should not be read or reasoned from to authorize an automatic right of judicial review of interlocutory orders. However, § 71-3-51 reasonably suggests a stratagem for judicial review of interlocutory orders under criteria like those found in Rule 5(a).[136] Notably, the MWCC has adopted almost identical standards for its review of interlocutory orders of MWCC administrative judges.

ii. Matters of Policy

The law is not a static entity that is; instead, it is a continually changing process of becoming. Policy considerations drive the process of becoming; this has always been so and is likely to remain so. Observantly, Oliver Wendell Holmes, Jr., captured the essence of this belief years ago when he wrote:

> [I]n substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.[137]

The discretionary power to review the interlocutory orders of administrative agencies, subject to the sound discretion of the empowered court is demonstrably "expedient for the community

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[135] *McCluskey*, 363 So. 2d at 264; *Teel*, 491 So. 2d at 857.

[136] MISS. R. APP. P. 5(a).

[137] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 35 (1881).

concerned."[138] The legislature has recognized this principle in § 9-3-61. Our only question is whether there is any provision of the positive law that denies such power.

Policy enters the mix in many guises. Judge Southwick does not accept the authority of the courts to engage in judicial review of interlocutory orders of administrative agencies.[139] Yet, he is intelligent enough to see the great public inconvenience inevitable from a rigid insistence on the final order rule he supports in general. He ameliorates this inconvenience by a pragmatic approach to defining "final judgment."[140] To his credit, Judge Southwick recants the rigid approach he supported in *Park Inn International v. Hull*.[141] Judge Southwick lists "some of the general categories of permissible and impermissible appeals" and concludes, "[a] decision by the first level appellate court that the agency was definitely wrong in one of its final decisions, even if the court remands for the agency to conduct further proceedings based on that reversal, is a final judgment that is appealable."[142]

In other words, if the circuit court had decided that the MWCC "was definitely wrong in one of its final decisions" that the compensation insurance carrier's coverage cancellation defense should be denied, then that decision "is a final judgment that is appealable," presumably on its merits.[143] Judge Southwick would nevertheless preclude the circuit court from ever making that decision, even though "the agency was

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[138] *Id.*

[139] Southwick, *supra* note 65, at 98, 111.

[140] J. R. Logging v. Halford, 765 So. 2d 580, 587-89 (Miss. Ct. App. 2000) (Southwick, J., concurring).

[141] 739 So. 2d 487, 491 (Miss. Ct App. 1999) (holding the circuit court's order which affirmed an award of temporary benefits, reversed a denial of temporary benefits, and remanded for a review of new evidence and ruling on permanent disability was interlocutory in nature and, therefore, not appealable). *Contra J. R. Logging*, 765 So. 2d at 588 (Southwick, J., concurring) ("Upon further consideration [of *Park Inn*], I now believe we were in error. I served on the panel deciding the case and fully agreed with it at the time. I no longer do."). *But see* Flexible Flyer, Inc. v. Harris, 755 So. 2d 50, 52 (Miss. Ct. App. 1999) (holding the MWCC's order remanding the case was interlocutory and, therefore, not appealable).

[142] *J. R. Logging*, 765 So. 2d at 589 (Southwick, J., concurring).

[143] *Id.*

definitely wrong in one of its final decisions,"[144] more than six years of delay remained before there might be a "final judgment" at the MWCC level, and, "the temporary benefits are not in practice recoverable should compensability ultimately be denied, a delayed appeal on compensability [coverage] grounds would be of no practical benefit to the employer and carrier."[145] In short, in his *J. R. Logging* concurrence, Judge Southwick accepts that pragmatic policy concerns may control the definition of "final judgment." He stops short of allowing policy to control in other circumstances which are indistinguishable on principle.

Judge Southwick's more recent dissent in *Cives Steel Co. v. Williams* acknowledged other policy concerns.[146]

> Judicial efficiencies might make it desirable in both a *Bickham* situation and a *Priester* one, that the agency complete all action that might be ordered prior to final judicial review. Balanced against that would be the inefficiencies in the agency process of requiring potentially useless additional proceedings that a still higher court might reject as having been unnecessary . . . .[147]

To be sure, the legislature has the authority to make this policy choice in ways that may in fact promote inefficiencies. The legislature has not done so in the present context, Judge Southwick's thoughtful views to the contrary notwithstanding.

Those members of the court with reservations in *Bickham* and *Cunningham* also sought to shore up their position on policy grounds, and *without* an apology. The five-judge concurrence in *Cunningham* copied *Bickham*. "The extended time in which it takes to finally determine and conclude workers' compensation cases has long been a serious concern of the judiciary, especially for this Court."[148] Such an excursion into policy premises lessens the credibility in assertions such as that "an option to

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[144] *Id.*

[145] *Flexible Flyer*, 755 So. 2d at 52 (quoting Bickham v. Dep't of Mental Health, 592 So. 2d 96, 99 (Miss. 1991) (Robertson, J., dissenting)).

[146] 905 So. 2d 661, 668-71 (Miss. Ct. App. 2004).

[147] *Id.* at 670.

[148] Cunningham Enterprises, Inc. v. Vowell, 937 So. 2d 32, 35 (Miss. Ct. App. 2006) (quoting *Bickham*, 592 So. 2d at 97).

appeal in litigation is a matter of statutory grace, not of right,"[149] leaving only the question whether there is any provision of the positive law that denies such power.

The concerns regarding delay raised in *Bickham* and *Cunningham* further beg the question. All thoughtful persons are sensitive to the delay and expense problems that may attend excessive, ill advised, or unnecessary interlocutory review, *viz.*, "the circuit court and supreme court should accept review of an interlocutory order of the commission only upon unusual circumstances. Piecemeal appeals, if granted routinely, could become a strategic ploy for employers to starve out impecunious workers."[150] Moreover, "delay" damage is a double-edged sword, which can cut the carrier and/or employer as well as the claimant, as the compensation case I consider above well demonstrates.

The traditional hostility to interlocutory appeals was manifest in the policy underpinnings of the final judgment rule. The simple thought was that piecemeal appeals were an inefficient way for trial and appellate courts to interact. In time, the thought was seen a bit simplistic, the proverbial blunt instrument, if you will. There is no getting around the fact that there really are interlocutory orders that, as a matter of public policy and the imperatives for civil justice or both, cry out for immediate review. In economic terms, there really are interlocutory orders where the social costs of clinging to an absolutist view of the final judgment rule exceed the costs of a properly administered regimen of discretionary judicial review of interlocutory orders. This is why today the discretionary authority to hear and adjudge appeals of and from interlocutory orders is a universal part of the state and national appellate jurisdictional landscape. Of course, appellate courts retain the power to limit such appeals to cases where some policy interest is implicated, which overrides the very real concerns undergirding the final judgment rule.

In this state, the first such overriding criteria is that

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[149] Miss. Dep't of Corr. v. Smith, 883 So. 2d 124, 126 (Miss. Ct. App. 2004).

[150] BRADLEY & THOMPSON, *supra* note 112, at 8-16.

acceptance of the interlocutory appeal bears the promise of "materially advanc[ing] the termination of the litigation and avoid[ing] exceptional expense to the parties."[151] The criteria comes from policy premises giving rise to a prominent expression found at the outset of the Mississippi Rules of Civil Procedure, *viz.*, "[t]hese rules shall be construed to secure the just, speedy, and inexpensive determination of every action."[152] Thoughtful persons add to the mix a consideration of transaction costs and, as well, the costs to the adjudicative system borne by us all.

Without dispute, the public interest demands that public adjudicative processes at all levels hold attendant transaction costs to a reasonable minimum. "Interlocutory appeals . . . are costly and time consuming," but not as costly or time consuming as "a trial on the merits in the wrong court"[153] or, as here, decisions that are demonstrably incorrect *coupled with* the costs and delay to the parties and the system inevitably attendant upon failure to provide a competent and timely adjudicative decision. The norms of legal practice are concerned with transaction costs at all levels and, where practicable, ameliorate their effects.[154] Administrators should eschew any "thought of imposing any procedural duty that will not be cost effective." [155]

The appellate courts of this state, including circuit and chancery courts judicially reviewing the actions of state administrative agencies, have ample authority to protect against excessive transaction costs. This point has long been known. Because this is so, the only excuse for the policy premise quoted

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[151] MISS. R. APP. P. 5(a)(1).

[152] MISS. R. CIV. P. 1; MISS. R. EVID. 102 ("elimination of unjustifiable expense and delay").

[153] Trustmark Nat'l Bank v. Johnson, 865 So. 2d 1148, 1153 (Miss. 2004).

[154] *See, e.g.*, Osborne v. Bullins, 549 So. 2d 1337, 1340 (Miss. 1989) (explaining specific performance should be ordered unless the level of transaction costs between the parties is so high that no voluntary exchange can take place); Comet Delta, Inc. v. Pate Stevedore Co., 521 So. 2d 857, 862 (Miss. 1988) (Robertson, J., concurring); State *ex. rel.* Pittman v. Miss. Pub. Serv. Comm'n, 538 So. 2d 367, 376 (Miss. 1989) (Robertson, J., dissenting) (indicating transaction costs are an important consideration in administrative processes).

[155] McGowan v. State Oil & Gas Bd., 604 So. 2d 312, 324 (Miss. 1992).

above from *Bickham*[156] and *Cunningham*[157] is the cynical assumption that our judges do not have the competence to enforce efficiently standards such as those found in Rule 5(a). Suffice it to say that any judicial failures in this regard may only be seen as self-inflicted wounds,[158] for which litigants and the public should not be required to pay.

The MWCC itself has recognized that interlocutory orders play an important role in avoiding delay.

> It is common knowledge that our judges decide many important issues following abbreviated motion hearings as provided for in Procedural Rule 22. This is generally to everyone's advantage because to delay such matters until after the completion of a more involved evidentiary hearing would constitute an unacceptable waste of time and resources.[159]

In *Mills*, the MWCC reminded us that six years earlier it held that it would grant review of such interlocutory orders "by reference to principles similar to those found in Miss R. App. P. 5."[160]

To the extent that delay remains a concern, there is no sensible reason why it cannot be addressed as effectively through prompt and sensitive application of the criteria of URCCC 5.03 as through the denial of judicial review of interlocutory orders altogether. And this can be done without slamming the door on an application which just might satisfy one or more of the Rule 5.03 criteria. Indeed, the serious policy question here is, what public interest will be served by categorically denying all judicial review of interlocutory agency

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[156] Bickham v. Dep't of Mental Health, 592 So. 2d 96, 97 (Miss. 1991).

[157] Cunningham Enters., Inc. v. Vowell, 937 So. 2d 32, 35 (Miss. Ct. App. 2006).

[158] *See, e.g.*, Miss. Farm Bureau Mut. Ins. Co. v. Parker, 921 So. 2d 260, 262 (Miss. 2005); *Trustmark Nat'l Bank*, 865 So. 2d at 1153. In fairness, Justice Carlson's two-fold lament should be noted: (1) that trial courts are not doing their job, *viz.*, "We implore our learned trial judges to studiously and timely consider," and that as a result of these trial judge failures "this Court is *inundated* with interlocutory appeals," *Miss. Farm Bureau*, 921 So. 2d at 262 (emphasis added), and (2) that lawyers are using Rule 5(a) as a hard ball litigation tactic and are otherwise abusing the process. *Id.*

[159] Mills v. Hercules, Inc., No. 0001965-G-7667, 2000 WL 1665251, at *3 (Miss. Work. Comp. Comm'n Oct. 16, 2000).

[160] *Id.* at *4.

actions which really do satisfy one or more of the criteria of Rule 5.03?

More specifically, how is the public interest served by slamming shut the courthouse door in cases where demonstrably judicial review on the merits bears the promise of "materially advanc[ing] the termination of the litigation and avoid[ing] exceptional expense to the parties."[161] The MWCC practices discretionary review of interlocutory orders of administrative judges where "such review may materially advance the final resolution of the claim, [and/or] avoid unnecessary delay or expense to the parties."[162] Is it not appropriate judicial deference to agency policy that the circuit courts accept discretionary review of interlocutory orders using the same criteria? Given all of this, and particularly the absence of any statute to the contrary, why would anyone think it was good and in the public interest to deny the authority for discretionary interlocutory review where it appears that such review would materially advance the termination of the proceeding and avoid exceptional expense to the parties?

A second, widely accepted alternative criteria for discretionary interlocutory review is that granting review would "protect a party from substantial and irreparable injury."[163] Though we are concerned here with judicial review by the circuit courts or chancery courts, as the case may be, and not the supreme court or the court of appeals, there is no sensible reason why this criteria might not also inform the reviewing court's exercise of its otherwise discretionary authority. What is so different about merits judicial review of interlocutory orders of administrative agencies, as compared and contrasted with appeals of interlocutory orders of trial courts, that a different rule is socially desirable? After all, the MWCC itself practices discretionary review of interlocutory orders of administrative judges where "such review may . . . protect a party from substantial and irreparable injury."[164]

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[161] MISS. R. APP. P. 5(a)(1).

[162] *Cunningham*, 937 So. 2d at 33.

[163] MISS. R. APP. P. 5(a)(2).

[164] *See* Hill v. Larson's Big Star Grocery, No. 92-04373-E-6856 (Miss. Work. Comp.

In *Flexible Flyer, Inc. v. Harris*,[165] the Mississippi Court of Appeals took note of such a potential for "substantial and irreparable injury," but felt obliged to follow *Bickham* anyway.

> Orders . . . contested [on] compensability grounds have always been held appealable on those issues. The reason this is and must be so is that maximum medical recovery, permanent disability, and related issues may not be susceptible of resolution for several years. Furthermore, since the temporary benefits are not in practice recoverable should compensability be ultimately denied, a delayed appeal on compensability grounds would be of no practical benefit to the employer and carrier.[166]

Again, in the absence of any statute to the contrary, why in the world would anyone think it was good and in the public interest to deny the authority for discretionary interlocutory review where it appears that such review would protect a party from substantial and irreparable injury?

Other states have adopted these views. In Alabama, interlocutory agency action is subject to judicial review "if review of the final agency decision would not provide an adequate remedy."[167] The same is so in Florida,[168] Iowa,[169] and Rhode Island.[170] In Maryland interlocutory agency action is subject to judicial review where the "interlocutory order . . . has immediate legal consequences; and . . . postponement of judicial review would result in irreparable harm."[171] The current draft of the Revised Model State Administrative Procedure Act would authorize judicial review of interlocutory agency action "if postponement of judicial review would result in an inadequate remedy or substantial and irreparable harm that outweighs the

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Comm'n Apr. 6, 1994); *Cunningham*, 937 So. 2d at 33.

[165] 755 So. 2d 50, 52 (Miss. Ct. App. 1999).

[166] *Id.* at 52 (quoting Bickham v. Dep't of Mental Health, 592 So. 2d 96, 99 (Miss. 1991) (Robertson, J., dissenting)).

[167] ALA. CODE § 41-22-20(a) (2007).

[168] FLA. STAT. § 120.68(1) (2008).

[169] IOWA CODE. ANN. § 17A.19(1) (West 2008).

[170] R.I. GEN. LAWS § 42-35-15(a) (2007).

[171] MD. CODE ANN. STATE GOV'T § 10-222 (b)(2) & (3) (West 2007).

public benefit derived from postponement."[172] The valid legal texts in the field are adequate that Mississippi may afford opportunities not unlike those available in these and other states.

The federal experience is also a source that should be considered, although Professor Richard J. Pierce, Jr., the leading commentator in the field, has shown that the opinions of the Supreme Court of the United States "on exhaustion do not form a consistent and coherent pattern."[173] The federal jurisprudence in the field includes a common law duty to exhaust administrative remedies that is "flexible and pragmatic" and "subject to several judge-made exceptions,"[174] though, as I argue here, a court "cannot excuse a petitioner from complying with an explicit and detailed statutory duty to exhaust administrative remedies."[175] The federal jurisprudence eviscerates any notion that all authority for interlocutory review is "purely statutory" or that "the need for a final order is universal." After an exhaustive review of the cases, Professor Pierce lays out a four-factor test, which has been adopted by some courts, for determining when interlocutory review—in the absence of any statute to the contrary—might be appropriate:

> [T]he test would require consideration of (1) the extent of injury to petitioner from requiring exhaustion of administrative remedies, (2) the degree of difficulty of merits issue the court is asked to resolve, (3) the extent to which judicial resolution of merits issue will be aided by agency factfinding or application of expertise, and (4) the extent to which the agency has already completed its factfinding or applied its expertise.[176]

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[172] Nat'l Conference of Comm'rs on Unif. State Laws, DRAFT REVISED MODEL STATE ADMIN. PROCEDURES ACT § 501(c) (2007).

[173] PIERCE, *supra* note 76, § 15.2, at 973.

[174] PIERCE, *supra* note 76, § 15.1, at 967.

[175] PIERCE, *supra* note 76, § 15.1, at 967.

[176] PIERCE, *supra* note 76, at § 15.2.

VI. Refuting the Argument that § 9-3-61 Is Not Self-Executing

I am aware of only one half-way intelligent argument contrary to what I have said above. That is the argument advanced in the five-judge *Cunningham* concurrence, *viz.*, that "Section 9-3-61 is an implied legislative authorization for interlocutory appeals from agencies, but the granted authority is not self-executing. Implementation requires that the supreme court prescribe general rules."[177] Otherwise, "the authority granted by the legislature lies dormant."[178] This argument is answered in what I have said above.

To begin with, the *Cunningham* concurrence necessarily accepts the point made above that § 9-3-61 carries with it recognition of a constitutional power of judicial review of interlocutory agency action. Section 9-3-61 is more than enough to show retroactively that *Sonford Products* was well within the court's power at the time it was decided. To be sure, it is better for us all if the court acts through its rule-making processes, putting out proposed rules for public comment, revising the proposed rule in the light of those comments and the court's own reflections, and in the end promulgating "general rules." On the other hand, *Southern Farm Bureau Casualty Insurance Co. v. Holland,*[179] *Hudspeth v. State Highway Commission,*[180] and *Chenier v. Chenier,*[181] are among a wide variety of instances where the court made rules deciding cases. If more specific legislative implementation of the "authori[ty] for interlocutory appeals from agencies" is needed, it may be found in § 11-51-95. That authority is not precluded by § 71-3-51 in the case of the Mississippi Workers Compensation Act, or many of the other agency statutes I have reviewed. Indeed, the authority for interlocutory review is enhanced by reasoning therefrom. In the exercise "of the judicial power granted in article VI, section 144,

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[177] *Cunningham*, 937 So. 2d at 34 (Southwick, J., concurring).

[178] *Id.* at 35.

[179] 469 So. 2d 55, 62-64 (Miss. 1984) (Anderson, J., concurring).

[180] 534 So.2d 210, 213 (Miss. 1988).

[181] 573 So.2d 699, 703-04 (Miss. 1990).

of the Mississippi Constitution of 1890," the court fills in the interstices the same as it has in recognizing and exercising pendent jurisdiction.[182] Section 9-3-61 is a legislative ratification of the premise that interlocutory appeals are proper subjects for the court's exercise of its inherent rule-making "judicial power granted in article VI, § 144, of the Mississippi Constitution of 1890."[183] Implementation has already taken place in 1995 in the form of Rules 2.02 and 5.01 to -.10 of the URCCC.

The point in the five-judge *Cunningham* concurrence that § 9-3-61 is not self-executing is a bit formalistic for modern tastes. That aside, there remains a place for formal legal reasoning, and I take a back seat to none in the defense of that place properly understood.[184] Reasoning by reference to principle and policy, history, and the aggregate texts in the field—not just § 9-3-61—compels a conclusion opposite of that reached by the *Cunningham* concurrence.

From a review of *Cunningham,* it seems quite apparent that the application for judicial review of the MWCC's interlocutory order fell far short of each of the four criteria set forth in URCCC 5.03. On its face, denial of review in the circuit court seems unexceptionable. On its face, the opinion in *Cunningham* gives no reason why the court of appeals would do anything other than recite the four criteria of Rule 5.03 and explain briefly why the application for interlocutory review satisfied none.

VII. JUDICIAL REVIEW OF INTERLOCUTORY AGENCY ACTION IS SUBJECT TO LEGISLATIVE RESTRICTIONS

We have noted repeatedly above that, judicial review of interlocutory agency action is subject to the legislative prerogative. Without question, the legislature has the power to create an agency, board, or commission and to provide that judicial review of its actions is restricted to those actions that

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[182] MISS. CODE ANN. § 9-3-61 (2002).

[183] *Id.*

[184] *See, e.g.*, Robertson & Clark, *supra* note 85, at 24-57.

are final. It is to be hoped that, where this may be done, the legislature will think twice to be sure of its premises and then carefully define finality, as the concept is a bit more complex than in ordinary civil litigation. Nothing said here suggests that any court should ignore, or seek to circumvent, a valid legislative expression that limits judicial review to final action of a particular agency, board, commission, or department.

We have hinted above at the variety of legislative expressions we have in the field. Some provide for judicial review in the circuit courts. Some provide for judicial review in the chancery courts. For present purposes, the statutes regulating some agencies actually address judicial review of final orders. A great number of such statutes merely provide for judicial review of an "action,"[185] a "decision,"[186] an "order,"[187] and "judgment or order."[188] In proceedings for judicial review of agency action under these statutes, there is no reason why, in proper cases, review should not be available for interlocutory action subject to the general criteria cited above.[189]

Many agency statutes include the limiting word "final."[190] If review is statutorily limited to final agency action, the courts should certainly enforce the limit. Where, however, as in the case of the Mississippi Workers Compensation Act, the statute is silent regarding interlocutory orders, review should be available under the principles articulated herein.

We have noted above that some statutes provide for judicial review of agency action, "in addition to other remedies otherwise

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[185] *See* MISS. CODE ANN. § 73-4-19 (2004); MISS. CODE ANN. § 73-9-65 (2004); MISS. CODE ANN. § 73-15-31(10) (2004).

[186] *See* MISS. CODE ANN. § 5-8-17 (2002); MISS. CODE ANN. § 39-13-19 (2007); MISS. CODE ANN. § 41-9-31 (2005); MISS. CODE ANN. § 69-7-667 (2005).

[187] *See* MISS. CODE ANN. § 53-9-69 (2003); MISS. CODE ANN. § 69-7-667 (2005).

[188] *See* MISS. CODE ANN. § 21-31-23 (2007).

[189] *See* MISS. R. APP. P. 5(a).

[190] *See e.g.*, MISS. CODE ANN. § 19-5-353(8) (2003) ("final order"); MISS. CODE ANN. § 45-4-9(7) (2004) ("final order"); MISS. CODE ANN. § 49-15-67 (2003) ("final order"); MISS. CODE ANN. § 25-9-131 (2006) ("final decision"); MISS. CODE ANN. § 41-67-29 (2005) ("final decision"); MISS. CODE ANN. § 43-20-14(5) (2004) ("final administrative action"); MISS. CODE ANN. § 37-45-51 (2007) ("final rule, regulation or order"); MISS. CODE ANN. § 53-1-39(a) (2003) ("final rule, regulation or order"); MISS. CODE ANN. § 71-3-51 (2000) ("final award").

available," or some such.[191] Other remedies contemplated by these statutes include the writ of certiorari,[192] suits for an injunction,[193] and other relief.[194]

VIII. SUMMARY AND CONCLUSIONS

The law is not an end in itself but a means to the end of a society in which we should all want to live. The greatest danger we face from our judges is that they will not see it within their mission to think and act as pragmatic instrumentalists,[195] and that is, what they are doing when they peek out the window at the effects of their judgments, for they affect more than just the litigants. To be sure, the judicial mission is constrained. It is ambiguous, given the judge's duty to adjudge justly is at times in tension with unavoidable reality that he or she will be a pragmatic instrumentalist, the only question being how good a pragmatist and how well the judge will balance these conflicts. Ordered liberty enhances the quality of our social interaction. Fair and even-handed reading and application of the law enhances administration, but does so best when lawmakers and judges see that there is more to the administration of the legal order than a just decision between two parties, much less a finality according to form. A competent judgment is so much more than a judge just doing his sums.

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[191] *See e.g.*, MISS. CODE ANN. § 17-17-45 (2003) (appeal of decisions of the Bureau of Pollution Control); MISS. CODE ANN. § 31-3-23 (2005) (appeal of decisions of the State Board of Public Contractors); MISS. CODE ANN. § 41-7-201 (2005) (appeal of decisions of the Hospital Reimbursement Commission); MISS. CODE ANN. § 49-17-41 (2003) (appeal of decisions of the Commission on Environmental Quality).

[192] *See* MISS. CODE ANN. §§ 11-51-93 to -95 (2002).

[193] Leslie Southwick, *Administrative Law*, *in* 1 ENCYCLOPEDIA OF MISSISSIPPI LAW § 2:75 (Jeffrey Jackson & Mary Miller eds., 2001 & Supp. 2007).

[194] *See* MISS. CODE ANN. §§ 11-13-1 to -7 (2004).

[195] Circuit Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit is only the most prominent recent and articulate exponent of legal pragmatism. *See, e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY 57-96 (2003). Legal pragmatism dates at least to Holmes, *see* HOLMES, *supra* note 137, at 1 ("The life of the law has not been logic; it has been experience."), includes many of the American legal realists of the 1920s and 1930s, and takes its texts from jurists and scholars of conservative and liberal stripes, and those hard to label. *See, e.g.*, BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984).

Although there is a recognized value in tradition, trouble brews in blind adherence to tradition. The final judgment rule is a rule of tradition, one that dates back until the memory of man runneth not to the contrary. In time we came to see that the final judgment rule led to social inconvenience. Writs of mandamus and prohibition, among others, appeared and allowed hope of a way around the final judgment rule. These were not enough, and in time most jurisdictions adopted some form of what is now Rule 5(a) of the Mississippi Rules of Appellate Procedure, the inexorable judicial retrenchment taking the form of fewer and fewer discretionary grants of interlocutory appeals.

In 1985, interlocutory appeals finally came to Mississippi. It is easy to look back and see this as inevitable, given the demonstrable public harm from the litigant's near inability to appeal an interlocutory order a generation ago, even in those circumstances one would think were obvious and which are now enshrined in subsections (1), (2), and (3) of Rule 5(a). We forget that in 1996, the legislature had to step in with § 9-3-61 to shore-up a ship under siege. Since this step has been taken and seems settled, there is all the more wonder that we do not embrace discretionary judicial review of interlocutory agency action.

One would have thought a signal apparent in the legislature's explicit language of "from *interlocutory or final* orders of . . . administrative boards and agencies,"[196] though it appears the legislature may have forgotten that most judicial review of agency action begins in the circuit and chancery courts, as opposed to the supreme court. This quirk in the Mississippi architecture for judicial review was easy to overlook in 1996 for on the whole it no longer makes sense, the legislature, just prior to enacting § 9-3-61, having created the court of appeals. There are other signals in agency actions such as *Hill v. Larson's Big Star Grocery,* and its progeny,[197] or "don't

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[196] MISS. CODE ANN. § 9-3-61 (2002).

[197] Hill v. Larson's Big Star Grocery, No. 92-04373-E-6856 (Miss. Work. Comp. Comm'n Apr. 6, 1994).

ask, don't tell" practices such as treating Gaming Commission site location decisions as "final."[198]

Still we are told "the need for a final order is universal," for the authority for judicial review is "purely statutory."[199] *Bickham* and *Cunningham* would blindly enshrine a tradition as familiar as it is unnecessary and as it is on occasion downright bad.

There can be no serious question but that there really are times when judicial review of interlocutory agency action, more likely than not, may materially advance the final resolution of the claim, and/or avoid unnecessary delay or expense to the parties, and/or protect a party from substantial and irreparable injury, and/or resolve an issue of general public importance. We have seen that there are several acceptable legal stratagems to the authority needed before such interlocutory review may be had. Statutes authorizing judicial review of the actions of some agencies contain no wording that a competent English linguist or grammarian would find to prelude interlocutory review. Where statutes authorize judicial review of final agency action and, without more, do not address the point of interlocutory review, there is no legal restraint upon the courts' recognizing a prudential authority to hear such cases, the same as with pendent jurisdiction in circuit and chancery courts. URCCC 2.02 and 5.01 to -.10 may be fairly read to this effect. There is always § 11-51-95 which permits review of "questions of law arising or appearing on the face of the record and proceedings" "of tribunals inferior to the circuit court." The remedy clause of § 24 of the Mississippi Constitution affords a principle from which to reason in one or all of these contexts. A thoughtful reflection upon separation of powers produces no impediment.

Of course, the legislature could amend § 9-3-61 to remove the objections lodged in the *Cunningham* concurrence, not to mention a flat-out legislative overruling of *Bickham*. While doing that, the legislature could take a giant leap forward by

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[198] *See, e.g.*, Miss. Casino Operators Ass'n v. Miss. Gaming Comm'n, 654 So.2d 892 (Miss. 1995).

[199] Leslie Southwick, *Administrative Law*, *in* 1 ENCYCLOPEDIA OF MISSISSIPPI LAW § 2:73, 2:79 (Jeffrey Jackson & Mary Miller eds., 2001 & Supp. 2007).

vesting the court of appeals with full authority for review of interlocutory and final agency action, removing the circuit and chancery courts from the field altogether, except in small cases where the transaction costs do not justify trips to the state capitol.

For the moment, *Bickham* stands with a touch of legitimacy emanating from the *Cunningham* concurrence. Upon dispassionate examination, and with respect, the defenders of *Bickham* and *Cunningham* can find no refuge from the sting of Holmes's famous protest:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[200]

Too many rules, like *Bickham*, leave us short of a society in which we should *all* want to live, particularly those who find themselves enmeshed within the processes of the regulatory state at times when judicial review of interlocutory agency action, more likely than not, may materially advance the final resolution of the claim, and/or avoid unnecessary delay or expense to the parties, and/or protect a party from substantial and irreparable injury. And why should any of us shrink from discretionary review of interlocutory agency action that may resolve an issue of general public importance?

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[200] Oliver Wendell Holmes, Jr., *The Path of the Law*, HARV. L. REV. 457, 469 (1897).

COMMENT

A *Patane* in the Neck: Should Mississippi Suppress Physical Evidence Discovered Pursuant to *Miranda* Violations as Fruits of the Poisonous Tree?

In *United States v. Patane*,[1] the Supreme Court sought to put an end to a legal debate that had been waged in courts throughout the country for nearly two decades: whether fruit-of-the-poisonous-tree analysis should be applied to evidence obtained in violation of *Miranda v. Arizona*.[2] Drawing upon a myriad of authorities, the Court concluded that *Miranda* functioned only to protect against violations of the Self-Incrimination Clause—concerns which were not implicated by the admission of physical evidence.[3] Therefore, application of the fruits doctrine to exclude physical evidence was neither necessary nor justified under the Fifth Amendment.[4]

Patane settled the fruits debate among the federal circuit courts. What *Patane* does not, indeed, *cannot* determine is the degree of protection that should be provided to criminal defendants under an analogous provision of a state's constitution.[5] While effective law enforcement is essential to

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[1] 542 U.S. 630 (2004) (plurality opinion).

[2] 384 U.S. 436 (1966).

[3] *Patane*, 542 U.S. at 635.

[4] *Id.* at 634. The specifics of the *Patane* decision are discussed more thoroughly *infra* notes 72-88 and accompanying text.

[5] *See e.g.*, Lego v. Twomey, 404 U.S. 477, 489 (1972) (holding that the prosecution must establish the voluntariness of a confession by a preponderance of the evidence, but noting that, "[s]tates are free, pursuant to their own law, to adopt a higher standard.").

effective crime control, should countervailing concerns of police misconduct and compromised judicial integrity demand a higher standard under state constitutional law? This article evaluates these concerns while maintaining a focus on the traditional purpose of the Self-Incrimination Clause—prohibiting the admission of compelled confessions at trial. If one does not lose focus of the principal issue, it is readily apparent that the Self-Incrimination Clause of the Mississippi Constitution[6] should not require the suppression of physical evidence discovered pursuant to a *Miranda* violation.

Section I of this article traces the evolution of the Self-Incrimination Clause from its common law origins to the Supreme Court's modern understanding of the right under *Miranda*, focusing primarily on the Court's struggle to protect the fundamental right against self-incrimination without unduly hindering law enforcement. Section II analyzes the Court's early fruits doctrine decisions which evinced a clear reluctance to expand *Miranda* to include the suppression of derivative testimonial evidence. Section III examines the Court's rationale for the *Patane* decision in light of *Miranda*'s constitutionalization. Finally, Section IV critically evaluates the arguments which purportedly justify the adoption of a higher standard, focusing primarily on the policy concerns of deterring police misconduct and preserving judicial integrity.

I. THE EVOLUTION OF THE FIFTH AMENDMENT SELF-INCRIMINATION CLAUSE

Before directly addressing the *Patane* decision and its probable impact on Mississippi law, a brief history of the right against self-incrimination is in order. Erroneously considered a byproduct of the American criminal system, the Self-Incrimination Clause's primitive ancestry can be traced back to England as early as 1246, when Englishmen began to voice opposition to the inquisitional practices of the ecclesiastical

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[6] MISS. CONST. art. III, § 26 (1890). Section 26, in pertinent part, provides: "In all criminal prosecutions the accused . . . shall not be compelled to give evidence against himself . . . ." *Id.*

courts.[7] Due to increasing unrest among the common people, King Henry III issued the *Prohibitio* which expressly prohibited the church from hearing pleas in their courts.[8] Of particular import was the edict: "And they suffer not that any Laymen . . . come together in any Places to make any such Recognitions by their Oaths . . . ." [9] Despite its initial conception as a means of thwarting the practice of the oath *ex officio*, the edict rapidly evolved into a more general prohibition of compelled confessions. By the mid-sixteenth century, common law courts recognized the right of the accused to refrain from issuing any statement which could establish his guilt at trial.[10] In 1848, the protection was extended to the accused at the preliminary hearing.[11]

It is undisputed that British colonists brought the principles of common law, including the purported right against self-incrimination, with them to the New World. However, due to the vast religious and political diversity in the colonies, it is impossible to determine with any certainty the extent to which the privilege was initially recognized.[12] The first invocation of the right on record occurred in 1637, when Reverend John Wheelwright of the Massachusetts colony was publicly charged with heresy.[13] In 1641, Massachusetts adopted the Body of

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[7] E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949). The resistance was primarily directed at the oath *ex officio*, whereby persons were hailed before the courts and required to answer under oath all inquiries presented by the church official in order to ascertain the truthfulness of alleged violations of church law or custom. *Id.*

[8] *Id.* at 3.

[9] *Id.* at 3-4. The *Prohibitio* effectively shielded the accused from disclosures given under oath which could subject them to criminal penalty at the hands of the ecclesiastical courts, a system which compelled the accused "to furnish his own indictment from his own lips under oath." *Id.* at 9.

[10] *Id.*

[11] *Id.* at 14. These statements should not to be construed as an endorsement of the English common law courts as just and honorable forums of truth. Torture was routinely employed as a means of procuring confessions well into the seventeenth century. Further, a defendant's refusal to answer interrogatories could be considered as evidence of guilt at trial. *Id.* at 18. These assertions are merely meant indicate that the right against self-incrimination is not a product of modern jurisprudence.

[12] Laurence A. Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 85 (1988).

[13] *Id.*

Liberties, a precursor to the modern Bill of Rights, which formally denounced the use of coercion to secure a confession.[14] Despite some much-publicized backsliding,[15] the year of 1780 marked the moment in which the privilege available at English common law became inextricably woven into the fabric of American jurisprudence.[16]

With its inclusion into the Bill of Rights in 1789, the "privilege" was transformed into the "right" against self-incrimination.[17] Unfortunately, James Madison, who submitted the proposed Bill of Rights, failed to provide any evidence as to the scope of the privilege or the policy rationale behind it.[18] The uncertainty surrounding the foundation and scope of the privilege resulted in a myriad of Supreme Court opinions purporting to define and later redefine the nature of the right, ultimately transforming the Self-Incrimination Clause from a provision generally prohibiting compelled confessions at trial into a shield protecting the criminally accused.

Boyd v. United States[19] marked the Court's first attempt at untangling the ambiguous language of the right, with the end result being an anomalous, error-strewn opinion that effectively blurred the lines between the Fourth and Fifth Amendments. E.A. Boyd would unwittingly start the ball rolling in 1884 when he attempted to smuggle six cases of glass into the Port of New

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[14] *Id.*

[15] Much like the right at English common law, the privilege against self-incrimination would endure a brief, yet notorious moratorium. During the hysteria that accompanied the Salem witch trials, judges frequently employed torture as a means of securing confessions. *Id.* at 86-87.

[16] *Id.* at 87. In that year, John Adams drafted the Massachusetts Declaration of Rights, which contained an analog to the modern Fifth Amendment. The provision provided that "[n]o subject shall . . . be compelled to accuse, or furnish evidence against himself." *Id.* at 87-88.

[17] *Id.* at 88.

[18] *Id.* at 89. The myriad of Supreme Court opinions that have purported to define, delineate, and constrain the right against self-incrimination can be viewed as the progeny of Madison's unfortunate lack of foresight. *See generally* Alfredo Garcia, *The Fifth Amendment: A Comprehensive and Historical Approach*, 29 U. TOL. L. REV. 209 (1998) (discussing the Supreme Court's efforts to interpret the ambiguous language of the Fifth Amendment).

[19] 116 U.S. 616 (1886).

York.[20] The discrepancies in Boyd's shipping invoice were discovered, and he was charged with fraud.[21] The United States District Court for the Southern District of New York demanded that Boyd produce these invoices at trial, despite the defendant's vehement protests that such action would constitute self-incrimination.[22] In an opinion penned by Justice Bradley, a unanimous Court agreed with the defendant, reasoning that the seizure of a man's private papers to be used as evidence against him is tantamount to compelling a man to testify against himself.[23]

Since the Fifth Amendment was not considered to be incorporated by the Fourteenth Amendment, the impact of *Boyd* on the states was minimal. However, state courts were not free to completely disregard the general prohibition against compelled confessions. The Fourteenth Amendment's Due Process Clause was routinely employed by the Supreme Court to overturn convictions based on confessions secured through torture or undue coercion.[24] In later decisions, the Court refused

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[20] *Id.* at 617.

[21] *Id.*

[22] *Id.* at 618. The act under which Boyd was charged required, upon request by the government, production of any related papers or invoices under control of the defendant. Absent a showing of just cause, the defendant's failure to produce the relevant documents was to be treated as a confession to the crime charged. *Id.* at 620.

[23] *Id.* at 633. The Court's opinion rested on the perceived interplay between the Fourth and Fifth Amendments. Justice Bradley stated:

> [T]he 'unreasonable searches and seizures condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment.

Id. The Warren Court would reexamine and ultimately reject *Boyd*'s conclusion that the Fourth and Fifth Amendments function to define each other. *Cf.* Schmerber v. California, 384 U.S. 757, 760 (1966) (holding that defendant's blood was not testimonial evidence, and thus forced withdrawal did not violate his right against self-incrimination); Warden v. Hayden, 387 U.S. 294, 302 (1967) (holding that admission of shirt seized during search of suspect's home was not testimonial evidence, and thus did not compel him to become a witness against himself).

[24] *See* Brown v. Mississippi, 297 U.S. 278 (1936) (defendant whipped and repeatedly hanged until confessing to rape); Chambers v. Florida, 309 U.S. 227 (1940) (defendant

to be bound by a trial court's determination that a defendant's confession was voluntary, choosing instead to independently examine the totality of the circumstances surrounding the confession.[25]

The 1960s witnessed a radical departure from traditional Fifth Amendment jurisprudence, as the Warren Court ushered in a new era of decisions interpreting and defining the constitutional guarantee. Though largely overshadowed by more celebrated Warren-era cases, *Malloy v. Hogan*[26] was the most significant Supreme Court decision regarding the Fifth Amendment since *Boyd*. William Malloy was arrested in a gambling raid in Hartford, Connecticut. While on probation, Malloy was ordered to testify before a tribunal of the Connecticut Superior Court concerning the events that surrounded his arrest. Malloy promptly refused to do so, and was held in contempt and sentenced to prison.[27] The Supreme Court granted certiorari and held that the Fifth Amendment's right to be free from compulsory self-incrimination extended to state witnesses by way of the Fourteenth Amendment.[28]

While the *Malloy* decision was a drastic departure from the traditional understanding of the guarantee, it was the landmark decision of *Miranda v. Arizona*[29] and its eponymous warnings that effectively turned traditional Fifth Amendment jurisprudence on its ear. Chief Justice Warren delivered the opinion of the Court, and summarily held that the government may not introduce at trial statements stemming from custodial interrogation of a defendant unless sufficient procedural

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questioned day and night for five days before confessing); Ashcraft v. Tennessee, 327 U.S. 274 (1946) (defendant subjected to thirty-six hours of continuous questioning before confessing).

[25] *See, e.g.*, Haynes v. Washington, 373 U.S. 503 (1963).

[26] 378 U.S. 1 (1964).

[27] *Id.* at 4. Malloy refused to consent to the inquiry on the grounds that his answers "tend[ed] to incriminate [him]." In affirming Malloy's denial of a writ of habeas corpus, the Connecticut Supreme Court held that the Fifth Amendment's privilege did not extend to a witness in a state proceeding. *Id.*

[28] *Id.* at 6. In rationalizing the abrupt shift in policy, Justice Brennan reasoned, "the American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay." *Id.* at 7.

[29] 384 U.S. 436 (1966).

safeguards were administered to secure the privilege against self-incrimination.[30] The Court commented on the inherently coercive custodial questioning procedures which had largely supplanted the use of the "third degree" and other barbaric methods of interrogation, and concluded that under such circumstances "the potentiality for compulsion [was] forcefully apparent."[31] Therefore, issuance of the appropriate warnings and a showing of knowing and intelligent waiver are prerequisites that must be satisfied before any statement by the defendant may be admitted at trial.[32]

With *Miranda,* the Court purported to set a bright-line rule to govern the admissibility of confessions. However, subsequent opinions indicated the Court's own growing discomfort with the decision, as numerous exceptions clouded what was ostensibly a settled area of the law. On several occasions, the Court held that the presumption of coercion does not necessarily always bar admission of a defendant's statements obtained in violation of *Miranda.* For instance, the Court has allowed admission of a defendant's unwarned statements for the purpose of impeaching his testimony at trial.[33]

In recent years, the Court has acknowledged that while the rule announced in *Miranda* functions to preserve the right against self-incrimination, it "sweeps more broadly than the

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[30] *Id.* at 444. The appropriate procedural safeguards envisioned by the majority formed the now infamous *Miranda* warnings: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* However, the Court noted that such warnings were only advisory, and need not be adhered to verbatim as long as equally effective measures are employed. *Id.* at 467, 491.

[31] *Id.* at 457. The majority concluded, "such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner." *Id.* This rationale justified the extension of the Fifth Amendment privilege to a suspect subjected to custodial interrogation within the station house as opposed to merely a defendant in the courthouse. *Id.* at 461.

[32] *Id.* at 476.

[33] Harris v. New York, 401 U.S. 222 (1971). *See also* New York v. Quarles, 467 U.S. 649 (1984) (recognizing a "public safety" exception to *Miranda*, under which a suspect's unwarned statements concerning the location of a firearm hidden in a city park were admissible at trial).

Fifth Amendment itself."[34] Essentially, the rule approached constitutional overkill in an effort to preserve the Fifth Amendment's guarantee against self-incrimination.[35] Thus, the Court's subsequent cases tried to maintain a harmony between facilitating effective law enforcement on the one hand, and upholding *Miranda*'s core prohibition against the use of unwarned statements on the other.[36] It is the accommodation of these competing goals that form the backdrop for the next section of analysis—the Court's unwillingness to apply the fruit-of-the-poisonous-tree doctrine to secondary testimonial evidence derived from *Miranda* violations.

II. *MIRANDA* VIOLATIONS AND FRUIT OF THE POISONOUS TREE DOCTRINE

The extension of the fruit-of-the-poisonous-tree doctrine to exclude testimonial evidence spawned from *Wong Sun v. United States*,[37] and was justified by the Supreme Court as a necessary means of deterring Fourth Amendment violations stemming from police misconduct. Wong Sun was charged with possession of heroin.[38] His arrest was based exclusively upon a tip given to federal narcotics agents as a result of an illegal arrest and subsequent search of another man's business.[39] The Court stated that "the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more

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[34] Oregon v. Elstad, 470 U.S. 298, 306 (1985).

[35] Recall the Warren Court's own assessment of the *Miranda* warnings. *See supra* note 30 and accompanying text. Chief Justice Warren cautioned that the holding was not to be interpreted as "a constitutional straitjacket." The Fifth Amendment did not mandate any specific incantation, as long as the procedure effectively secured the privilege against self-incrimination. *Miranda*, 384 U.S. at 467. *See also* Michigan v. Tucker, 417 U.S. 433, 444 (1974).

[36] Dickerson v. United States, 530 U.S. 428, 443-44 (2000).

[37] 371 U.S. 471 (1963).

[38] *Id.* at 475.

[39] *Id.* The United States Court of Appeals for the Ninth Circuit had previously held that the arrests and subsequent searches were invalid because they were not based on probable cause, as there was no showing that the informant was reliable. *Id.* at 477-78. The Supreme Court agreed. *Id.* at 479.

traditional seizure of 'papers and effects.'"[40] The Court reasoned that the fruits doctrine is appropriate where, "granting establishment of the *primary illegality*, the evidence . . . has been come at by exploitation of that illegality."[41] While *Wong Sun* stood for the rather unremarkable principle that secondary testimonial evidence derived from a Fourth Amendment violation was subject to the exclusionary rule, the Court was soon called upon to decide whether the principle extended to evidence derived in violation of *Miranda* as well.

The Court first addressed the question of whether *Miranda* violations bear poisonous fruit in *Michigan v. Tucker*.[42] Tucker was arrested on suspicion of raping and severely beating his neighbor.[43] An officer failed to effectively advise Tucker of his rights, and Tucker subsequently provided the name of an alleged alibi. Police contacted the alibi, and he provided statements which incriminated Tucker.[44] Tucker argued that all evidence derived from his unwarned statements should be suppressed, including the statements of the witness.[45]

The Court ruled against suppression of the witness's statements by concluding that the police conduct did not violate Tucker's rights under the Fifth Amendment.[46] The exclusionary

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[40] *Id.* at 485. The fruits doctrine had traditionally been applied to physical evidence derived from Fourth Amendment violations. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The Court reasoned that the policy rationales furthered by the Fourth Amendment exclusionary rule, namely deterrence of police misconduct, did not warrant a distinction between testimonial and physical evidence. *Wong Sun*, 371 U.S. at 486.

[41] *Wong Sun*, 371 U.S. at 488 (emphasis added). The importance of the illegality of the conduct cannot be understated. Absent illegality resulting from the violation of some fundamental right, the deterrence rationale is unnecessary. *Cf.* United States v. Patane, 542 U.S. 630, 643 (2004) ("Because police cannot violate the Self-Incrimination Clause by taking unwarned though voluntary statements, an exclusionary rule cannot be justified by reference to a deterrence effect on law enforcement.").

[42] 417 U.S. 433 (1974).

[43] *Id.* at 436. It is worth noting that Tucker became a suspect after police discovered a dog in the victim's home. The victim denied ownership of the animal. After being released, the dog promptly returned to Tucker's residence with officers in tow. *Id.*

[44] *Id.*

[45] *Id.* at 439.

[46] *Id.* at 446. The Court noted at the outset that the violation of the *Miranda* rule did not violate Tucker's constitutional rights because his statements to the officers were

rule primarily serves to deter police misconduct, and the Court reasoned that the violation in *Tucker* was inadvertent rather than intentional.[47] As such, the rationale for suppression of the secondary evidence was insufficient to override the significant interests mandating its admission.[48]

A decade later, *Oregon v. Elstad*[49] required the Court to reexamine the issue of whether the *Wong Sun* fruits doctrine was applicable to *Miranda* violations. Elstad was apprehended in his home by officers investigating a nearby burglary.[50] An officer stated that he suspected Elstad's involvement in the crime, to which the he stated: "Yes, I was there."[51] After being escorted to the station house, Elstad was advised of his rights, and subsequently gave a full confession. Elstad later moved to suppress the confession as a fruit of the previous, unwarned statement at his home.[52]

At the outset, the Court noted the fundamental differences between the function of the Fourth Amendment exclusionary rule and the function of *Miranda*, which is to guard against the use of unwarned statements prohibited under the Fifth Amendment.[53] While the deterrence rationale mandated a broad application of the fruits doctrine to Fourth Amendment violations, violations of *Miranda* were distinctively different.[54] Absent a showing of actual coercion, a mere violation of *Miranda*

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not admitted at trial. *Id.* at 445-46.

[47] *Id.* at 446-47. The Court noted that the officers acted in good faith. Further, the Court gave substantial weight to the fact that Tucker's interaction with the officers took place prior to the *Miranda* decision. *Id.* at 447.

[48] *Id.* at 450. The Court considered such factors as the strong interest in providing the jury with all available, trustworthy evidence, as well as society's interest in the effective prosecution of criminals. *Id.*

[49] 470 U.S. 298 (1985).

[50] *Id.* at 301.

[51] *Id.*

[52] *Id.* at 301-02. Elstad argued that his previous statement to the police sufficiently "let the cat out of the bag," and rendered his subsequent statements inadmissible under *Wong Sun*. *Id.* at 302.

[53] *Id.* at 304. The Court reaffirmed the distinction between an officer's failure to administer *Miranda* warnings and an officer's violation of the constitutional guarantee against unreasonable searches and seizures. *Id.*

[54] *Id.* at 306-07.

did not constitute a violation of Elstad's constitutional rights, and thus did not justify application of the fruits doctrine.[55]

In both *Tucker* and *Elstad*, the Court's reluctance to extend the fruits doctrine to *Miranda* violations stemmed in large part from the view that *Miranda* warnings were merely procedural safeguards which were not themselves mandated by the Fifth Amendment.[56] The Court's language describing the *Miranda* warnings as mere "prophylactic standards"[57] which "swe[pt] more broadly than the Fifth Amendment"[58] evinced a reluctance to extend them full constitutional status. Chief Justice Warren's language in *Miranda* was partly attributable to the restraint.[59] If *Miranda* was not considered a constitutional imperative, the failure to effectively administer warnings could not violate a suspect's Fifth Amendment rights as long as the resulting statements were suppressed at trial.[60] However, such a rationale relied heavily on the tacit assumption that *Miranda* was indeed *not* a constitutional decision. The next section examines the effect of *Dickerson v. United States* on the *Miranda* poison fruit cases, and how *United States v. Patane* managed to right a suddenly listing ship.

III. THE CONSTITUTIONALIZATION OF *MIRANDA* AND THE FRUITS DEBATE REVISITED

In the wake of *Miranda*, Congress passed 18 U.S.C. § 3501 which essentially made the admissibility of custodial statements hinge on a determination of whether or not they were given voluntarily.[61] Dickerson was indicted for violating federal law

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[55] *Id.* at 308. The Court held that a noncoercive *Miranda* violation did not justify the suppression of a defendant's subsequent, voluntary testimony. *Id. But see* Missouri v. Seibert, 542 U.S. 600 (2004) (plurality opinion) (holding inadmissible defendant's secondary statements obtained by way of intentional "question first—warn later" strategies).

[56] *See* Michigan v. Tucker, 417 U.S. 433, 444 (1974); *Elstad*, 470 U.S. at 307, 308.

[57] *Tucker*, 417 U.S. at 446.

[58] *Elstad*, 470 U.S. at 306.

[59] *See supra* note 35 and accompanying text.

[60] *See supra* note 46 and accompanying text.

[61] Dickerson v. United States, 530 U.S. 428, 432 (2000). Section 3501 further provided that "[t]he trial judge in determining the issue of voluntariness shall take into

and made incriminating statements to federal investigators.[62] Subsequently, Dickerson argued for suppression of these statements because he was not advised of his rights under *Miranda*.[63] Dickerson initially prevailed on the suppression motion, but it was overturned on appeal.[64] The United States Court of Appeals for the Fourth Circuit held that *Miranda* was not a constitutional rule, and therefore § 3501 applied.[65] The Supreme Court granted certiorari and reversed.[66]

The Court reasoned that while several opinions implied that *Miranda* was not of constitutional origin, both the language of *Miranda* itself and the subsequent treatment of *Miranda* in other cases clearly indicated otherwise.[67] The Court pointed out that *Miranda* had been routinely applied by federal courts to state courts, and that such "authority is limited to enforcing the commands of the United States Constitution."[68] Further, its constitutional status was reinforced by the fact that prisoners were allowed to bring *Miranda* violations before federal courts in habeas corpus proceedings.[69] Finally, language in the opinion itself indicates that Chief Justice Warren purported to announce a constitutional rule.[70] The Court stated that the *Elstad* decision did not stem from a view that *Miranda* was nonconstitutional, but merely that violations of the Fourth Amendment differ from unwarned questioning under the Fifth

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consideration all the circumstances surrounding the giving of the confession." 18 U.S.C. § 3501(b) (1968). Essentially, Congress sought a return to traditional Fifth Amendment analysis. *See supra* note 24 and accompanying text.

[62] *Dickerson*, 530 U.S. at 432.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* at 438.

[68] *Id.* (quoting Mu'Min v. Virginia, 500 U.S. 415, 422 (1991)).

[69] *Dickerson*, 530 U.S. at 439.

[70] *Id.* At the outset of the opinion, Chief Justice Warren declared the Court's intention was "to give concrete constitutional guidelines." Miranda v. Arizona, 384 U.S. 436, 441-42 (1966). While *Miranda* claimed not to create "a constitutional straitjacket," the Court reasoned that such language only indicated that those exact warnings were not required. *Dickerson*, 530 U.S. at 440 (quoting *Miranda*, 384 U.S. at 467).

Amendment.[71]

Less than two years later, the Court of Appeals for the Tenth Circuit relied heavily on *Dickerson* in adjudicating a suppression issue involving physical evidence discovered pursuant to a *Miranda* violation.[72] Defendant Patane violated a restraining order prohibiting him from contacting his former girlfriend, Linda O'Donnell.[73] O'Donnell reported the violation to Officer Fox and informed her that Patane possessed a handgun.[74] Officer Benner then notified Officer Fox that Patane was a convicted felon, and the two proceeded to Patane's residence.[75] The officers placed Patane under arrest and Officer Benner began to advise Patane of his *Miranda* rights.[76] Patane interrupted Officer Benner at the right to remain silent, and no further warnings were administered.[77] Officer Benner asked Patane about the handgun, and Patane confirmed that it was inside and gave him permission to retrieve it.[78] Patane was charged as a felon in possession of a handgun, and he moved to suppress the pistol as the fruit of a *Miranda* violation.[79]

The Court of Appeals for the Tenth Circuit held that the gun should have been suppressed.[80] The majority noted that both *Tucker* and *Elstad* declined to extend the fruits doctrine to a *Miranda* violation, but concluded that both cases were predicated upon the pre-*Dickerson* view that *Miranda* did not announce a constitutional rule.[81] Furthermore, since *Elstad* involved derivative testimonial evidence rather than physical evidence, the Court of Appeals found it distinguishable.[82] Therefore, the Court of Appeals concluded that the physical fruit

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[71] *Dickerson*, 530 U.S. at 441.

[72] United States v. Patane, 304 F.3d 1013 (10th Cir. 2002).

[73] *Id.* at 1015.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* at 1018.

[80] *Id.* at 1019.

[81] *Id.*

[82] *Id.* at 1021.

of *Miranda* violations must be suppressed in order to effectuate *Miranda*'s deterrent purpose.[83]

The Supreme Court granted certiorari and reversed.[84] Justice Thomas criticized the Tenth Circuit for misinterpreting *Dickerson*, and erroneously concluding that a failure to warn under *Miranda* constituted a violation of the Fifth Amendment.[85] Justice Thomas stated that *Dickerson* had no effect on the validity of *Elstad*, specifically noting that the Court had strived in "subsequent cases [to reduce] the impact of the *Miranda* rule on legitimate law enforcement while reaffirming *Miranda*'s core ruling *that unwarned statements may not be used as evidence*."[86] Since *Miranda* is a "fundament trial right," police do not commit a constitutional violation by failure to administer the requisite warnings.[87] Accordingly, the fruit-of-the-poisonous-tree doctrine is inapplicable because there is no police

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[83] *Id.* at 1028. The court noted that a contrary holding would create a strong incentive for police misconduct, as the admissibility of derivative physical evidence would undermine the necessity of testimonial evidence. *Id.* at 1026. Therefore, application of the fruits doctrine would serve as a strong deterrent. *Id.*

[84] United States v. Patane, 542 U.S. 630 (2004) (plurality opinion). Justice Thomas announced the opinion of the Court, in which Justice Scalia and Chief Justice Rehnquist joined. *Id.* at 633. Justices Kennedy and O'Connor concurred in the judgment. *Id.* at 644. Justice Souter filed a dissenting opinion, which was joined by Justices Stevens and Ginsburg. Justice Breyer filed a separate dissent. *Id.* at 645.

[85] *Id.* at 636. Justice Thomas reasoned that the core protection afforded by both the Self-Incrimination Clause and the *Miranda* rule is a prohibition on the use of compelled testimony in criminal trials. Since the Fifth Amendment and *Miranda* are concerned only with testimonial evidence, neither doctrine justified the suppression of physical evidence. *Id.* 636-37. *See also* Schmerber v. California, 384 U.S. 757, 765 (1966) (holding that blood test evidence was not testimonial evidence under the Fifth Amendment).

[86] *Patane*, 542 U.S. at 640 (quoting Dickerson v. United States, 530 U.S. 428, 443-44 (2000)) (emphasis added). Justice Thomas insisted that *Dickerson* did not affect the Court's prior view that a failure to warn under *Miranda* did not violate a suspect's constitutional rights. *Id.* at 641 (citing Chavez v. Martinez, 538 U.S. 760 (2003)) (noting that a failure to issue *Miranda* warnings to a suspect is insufficient grounds for suit against interrogation officers under 42 U.S.C. § 1983 (2000)).

[87] *Id.* at 641. Justice Thomas opined that a Fifth Amendment violation occurs only if the unwarned statements are subsequently admitted at trial. *Id.* While agreeing with the outcome of the case, Justice Kennedy stated that it was unnecessary to address the effect of a *Miranda* violation or whether a deterrence rationale was unjustified. *Id.* at 645 (Kennedy, J., concurring).

misconduct to deter.[88]

IV. *MIRANDA* VIOLATIONS SHOULD NOT BEAR FRUIT UNDER THE MISSISSIPPI CONSTITUTION

Patane's rejection of the fruits doctrine is grounded in the view that the Fifth Amendment's Self-Incrimination Clause cannot be violated by a mere failure to administer to *Miranda* warnings. Therefore, a deterrence rationale is unwarranted.[89] However, because *Dickerson* constitutionalized *Miranda,* states are not free to disregard the warnings. As a result, state courts are forced to make a judgment call as to the degree of protection their constitutions afford a defendant under *Miranda.* If a state constitution regards *Miranda* as not only a means of protecting the privilege against self-incrimination, but also as a fundamental check on police investigatory procedure, the fruits argument appears to have some merit.

In the three years following the *Patane* decision, the Mississippi Supreme Court has not directly addressed the admissibility of physical evidence discovered pursuant to a *Miranda* violation.[90] Therefore, the question remains: Should

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[88] *Id.* at 642. Justice Thomas reasoned that "any further extension of [the *Miranda* rule] must be justified by its necessity for the protection of the actual right against compelled self-incrimination." *Id.* at 639. Since the introduction of physical evidence does not constitute compelled testimony under the Fifth Amendment, applying the fruits doctrine would not satisfy the "close-fit requirement." *Id.* at 640. The Supreme Court has in prior cases refused to apply the exclusionary rule where suppression of the evidence would not serve to protect the individual's rights. *Cf.* Hudson v. Michigan, 547 U.S. 586 (2006) (holding that the exclusionary rule is not the proper remedy to protect the privacy rights implicated by "knock and announce" violations); New York v. Harris, 495 U.S. 14 (1990) (holding that an illegal, warrantless arrest of an individual in his or her home does not justify the suppression of the individual's voluntary statements taken later at the stationhouse).

[89] *See supra* note 41 and accompanying text.

[90] The Mississippi Court of Appeals did issue an opinion summarily dismissing a suspect's contention that physical evidence should have been suppressed at trial because an officer failed to administer *Miranda* warnings. However, the judgment was entered nine months before *Patane* was decided, and relied exclusively on the view that the Self-Incrimination Clause "only extend[ed] to evidence of a testimonial or communicative nature." McKee v. State, 878 So. 2d 232, 237 (Miss. Ct. App. 2004) (citing Schmerber v. California, 384 U.S. 757, 761 (1966)). *See also* Banks v. State, 481 So. 2d 844, 845-46 (Miss. 1985) (holding that officers did not violate the Fifth Amendment by failing to issue

Mississippi continue to adhere to the United States Supreme Court's decisions defining the scope of the privilege against self-incrimination, or decline to extend *Patane* on independent state grounds?[91] The following subsections explain why concerns of police misconduct and judicial integrity do not justify the extension of the fruits doctrine to *Miranda* violations under Article 3, Section 26 of the Mississippi Constitution of 1890.

A. The Fruits Doctrine as a Means of Deterring Police Misconduct

In *Wong Sun*, the Supreme Court acknowledged that the suppression of reliable evidence is sometimes necessary "to make effective the fundamental constitutional guarantees."[92] However, the fundamental guarantee referenced by the Court was the right of the individual to enjoy the sanctity of his or her home free from unreasonable searches and harassment by the government.[93] It was the critical distinction between a violation of a constitutional right and the violation of *Miranda,* a rule employed to enforce a constitutional right, which the Court went to great lengths to emphasize in *Elstad.*[94] Unlike the guarantee against unreasonable searches,[95] "the Miranda warnings . . . are not themselves rights protected by the Constitution."[96] Instead, *Miranda* functions to protect the right against self-incrimination under the Fifth Amendment.[97] While such a distinction appears at first a matter of semantics, it is essential to understanding

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Miranda warnings because suspect made no incriminating statements).

[91] *See* Michigan v. Long, 463 U.S. 1032, 1040 (1983).

[92] Wong Sun v. United States, 371 U.S. 471, 484 (1963).

[93] *Id.*

[94] Oregon v. Elstad, 470 U.S. 298, 304 (1985). The Oregon Court of Appeals had mischaracterized the officer's initial failure to warn as a violation of the Fifth Amendment itself. *Id.*

[95] U.S. CONST. amend. IV.

[96] *Elstad*, 470 U.S. at 305 (quotations omitted). *See also* Miranda v. Arizona, 384 U.S. 436, 467 (1966). This view of *Miranda* was left untouched by *Dickerson*, as the Court later noted that the language merely recognized a difference between unreasonable searches and unwarned interrogations. Dickerson v. United States, 530 U.S. 428, 441 (2000).

[97] Patane v. United States, 542 U.S. 630, 641 (2004).

why the fruits doctrine is an unnecessary and unjustified expansion of *Miranda.*

"The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits."[98] The Court noted in *Mapp v. Ohio* that without the remedy of suppression, "the Fourth Amendment would have been reduced to a form of words."[99] However, unlike the Fourth Amendment's judicially-created exclusionary rule, the Fifth Amendment contains its own exclusionary rule prohibiting the use of compelled testimony.[100] Where the exclusionary rule of the Fourth Amendment is concerned with deterring police misconduct, the Fifth Amendment's exclusionary rule is concerned with securing trustworthy, reliable evidence.[101] The exclusionary remedy is triggered whenever a suspect is subjected to coercive interrogation methods, and *Miranda* furthers this end by affording a presumption of coercion where a suspect is questioned without being advised of his rights.[102] However, because the Fifth Amendment's primary concerns are evidentiary in nature, a failure to warn under *Miranda* does not rise to the level of a constitutional violation absent the admission of unwarned statements at trial.[103] Thus, there is nothing to deter.[104]

Critics of *Patane* argue that the Court's deterrence analysis is flawed in one major respect: in refusing to suppress the fruits of an unwarned statement, the Court creates an incentive for "officers to flout *Miranda* when there may be physical evidence to be gained."[105] While such contentions are not wholly without

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[98] *Elstad*, 470 U.S. at 306.

[99] 367 U.S. 643, 648 (1961).

[100] *Patane*, 542 U.S. at 640 (quotations omitted).

[101] *See id.* at 639-40; *Elstad*, 470 U.S. at 308; Michigan v. Tucker, 417 U.S. 433, 449 (1974).

[102] *Patane*, 542 U.S. at 639, 640.

[103] *Id.* at 641. Justice Thomas noted that this stems from the nature of the Fifth Amendment right protected by *Miranda*: "It is a fundamental *trial* right." *Id.*

[104] *Id.* at 642. "[T]he exclusion of the unwarned statements . . . is a complete and sufficient remedy" for a violation of *Miranda. Id.* at 643.

[105] *Id.* at 647 (Souter, J., dissenting). Ordinarily the suppression of unwarned statements under *Miranda* serves as a sufficient deterrent against officer misconduct.

merit, the argument loses focus of the primary purpose of *Miranda*, which is to protect the Fifth Amendment guarantee. As Justice Thomas stated in *Patane*, "any further extension of [*Miranda*] must be justified by its necessity for the protection of the actual right against compelled self-incrimination."[106] The Self-Incrimination Clause prohibits only compelling a defendant to be "a witness against himself."[107] This language has been interpreted to protect a suspect only from being compelled to testify against himself, or provide the prosecution with evidence of a testimonial nature.[108] As such, the admission of nontestimonial physical evidence in no way implicates the concerns of the Fifth Amendment.[109] Thus, any deterrent effect accomplished by the extension of the fruits doctrine to unwarned statements would simply provide an unjustified windfall to defendants without furthering the primary purpose of protecting the privilege against self-incrimination.[110]

While *Patane* does not preclude state courts from adopting higher standards to ensure compliance with *Miranda*, justifying such a decision on the grounds of deterrence is unwarranted. The argument that suppression of unwarned statements alone is insufficient to deter police overreaching[111] ignores the Court's

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However, under *Patane*, the potential discovery of admissible physical evidence may provide an incentive for officers to intentionally disregard issuance of *Miranda* warnings. One scholar notes:

> Suppression of a suspect's unwarned statements alone will not provide sufficient deterrence of police misconduct. Police officers seeking physical evidence are not likely to view the loss of an unwarned confession as particularly great when weighed against the opportunity to recover highly probative nontestimonial evidence, such as a murder weapon or narcotics.

David A. Wollin, *Policing the Police: Should* Miranda *Violations Bear Fruit?*, 53 OHIO ST. L.J. 805, 846 (1992).

[106] *Patane*, 542 U.S. at 639.

[107] *Id.* at 644 (quoting U.S. CONST. amend. V).

[108] Schmerber v. California, 384 U.S. 757, 761 (1966).

[109] *Patane*, 542 U.S. at 645 (Kennedy, J., concurring). Justice Kennedy reasoned that the suppression of highly probative physical evidence cannot be justified by a deterrence rationale in light of the Self-Incrimination Clause's evidentiary roots. *Id.*

[110] *Id.* at 643. Justice Thomas acknowledged that the admission of physical fruits in no way implicates the Fifth Amendment concern that a defendant's coerced statements will be admitted at trial. *Id.*

[111] Wollin, *supra* note 105, at 846. *See also* Commonwealth v. Martin, 827 N.E.2d

assessment of intentional "question first" tactics in *Missouri v. Seibert.*[112] *Patane* only applies to the fruit of *voluntary* statements.[113] Therefore, a deliberate attempt to circumvent *Miranda* may constitute coercion, thereby triggering suppression of both the statements and any fruits derived therefrom.[114] Since the fruits of actually-coerced statements are subject to suppression, there is no reason to extend additional protection to mere violations of *Miranda.*[115]

B. The Fruits Doctrine as a Means of Preserving Judicial Integrity

Although a deterrence-based argument for rejecting *Patane* is without merit, it does not necessarily mean that no compelling reason exists for affording higher protection at the state level. In *Patane*, Justice Thomas stated: "It is not for this Court to impose its preferred police practices on . . . state [law enforcement officials] . . . ."[116] However, as previously noted, *Miranda* is a constitutional rule that is binding upon the states. Therefore, state courts may, in the interest of judicial integrity, apply the fruits doctrine to ensure that law enforcement officials fully adhere to *Miranda* under their respective state constitutions. Unlike the deterrence rationale, which attempts to couch the admission of physical fruits as a violation of the

198, 204-05 (Mass. 2005) (declining to extend *Patane* on state constitutional grounds in an effort to deter intentional police misconduct).

[112] Missouri v. Seibert, 542 U.S. 600, 603 (2004) (plurality opinion) (holding that statements derived from deliberate "two-step" interrogation methods are inadmissible). *See also supra* note 55.

[113] *Patane*, 542 U.S. at 644.

[114] *Id.* Justice Kennedy has advocated such an outcome for intentional efforts to undermine *Miranda*. *Seibert*, 542 U.S. at 617 (Kennedy, J., concurring). *See also Patane*, 542 U.S. at 647-48 (Breyer, J., dissenting) (advocating a "good faith" analysis to determine whether failure to administer *Miranda* warnings should trigger suppression of fruits). The Court has yet to clarify whether *Seibert* is considered a mere "failure to warn" case or whether the deliberate tactics employed by the Missouri officers constituted "actual coercion."

[115] *See supra* notes 85, 86 and accompanying text. Justice Thomas makes clear that *Miranda* merely protects the privilege against self-incrimination, and this objective is sufficiently accomplished by the suppression of unwarned testimonial evidence.

[116] *Patane*, 542 U.S. at 642.

Self-Incrimination Clause, the judicial integrity approach refuses to allow the government to skew the fairness of the adversarial system by exploiting a constitutional loophole.

Judicial integrity as a mandate for higher protection can hardly be criticized as impractical or unjustified; indeed, the *Miranda* decision was largely a product of concern for judicial integrity.[117] Further, the fruits doctrine has long been recognized as a means of preserving the "judicial integrity so necessary in the true administration of justice."[118] As one critic noted, "[admission of] the physical fruits of inherently compelling custodial interrogations jeopardizes the integrity of the fact-finding process in the court."[119] By allowing prosecutors to utilize the physical fruits loophole created by *Patane*, it can be argued that courts are essentially sanctioning the very conduct which *Miranda* purported to prohibit.[120]

However, it should be noted that the Supreme Court did not discuss the impact of *Patane* on judicial integrity.[121] The

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[117] Miranda v. Arizona, 384 U.S. 436, 480 (1966). The decision rested largely on the Court's perception that the guarantee of the Self-Incrimination Clause would be jeopardized absent a rule to enforce its protection. The Court reasoned: "In a government of laws, existence of the government will be imperilled [sic] if it fails to observe the law scrupulously . . . . If the government becomes a lawbreaker, it breeds contempt for law . . . it invites anarchy." *Id.* (Brandeis, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928)).

[118] Mapp v. Ohio, 367 U.S. 643, 660 (1961). *See* Brown v. Illinois, 422 U.S. 590, 611 (1975) (Powell, J., concurring) ("the corresponding mandate to preserve judicial integrity most clearly demands that the fruits of official misconduct be denied"). Countervailing concerns for effective law enforcement are insufficient to overcome the Supreme Court's interest in upholding the mandates of the Constitution. In justifying the extension of the exclusionary rule to the states, the Court noted:

> [T]here is another consideration—the imperative of judicial integrity. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

Mapp, 367 U.S. at 659 (citations omitted).

[119] Kirsten Lela Ambach, Comment, Miranda*'s Poisoned Fruit Tree: The Admissibility of Physical Evidence Derived from an Unwarned Statement*, 78 WASH. L. REV. 757, 791 (2003).

[120] Wollin, *supra* note 105 at 841.

[121] One scholar was incensed by the conspicuous absence of a judicial integrity analysis in the Court's decision, and asked:

> Doesn't the Court care that when the police fail to administer the *Miranda*

absence of analysis was not judicial oversight, but surely stemmed from the Court's understanding of *Miranda* and its relationship with the Fifth Amendment. Because *Miranda* sweeps more broadly than the Fifth Amendment, there exists a grey area between a *Miranda* violation and a violation of the Self-Incrimination Clause.[122] *Patane* clearly implicated this grey area. The Court did not attempt to assuage concerns for judicial integrity because the approach followed in *Patane* did not violate or even circumvent a constitutional guarantee. The officers conceded that a violation of *Miranda* occurred, and therefore Patane's statements, though voluntary, were inadmissible. However, the discovered physical evidence did not constitute testimonial evidence, and thus its admission did not implicate the Self-Incrimination Clause.[123]

As the Supreme Court noted in *Dickerson*, "no constitutional rule is immutable."[124] Therefore, rather than viewing *Patane* as a threat to judicial integrity, state courts should simply accept it as another exception to the *Miranda* rule. Exceptions to *Miranda* do not require the court to sanction a violation of fundamental rights. Exceptions to *Miranda* merely serve to distill the rule in order to reduce its negative impacts while preserving the core principals it was designed to protect.[125] As the Court noted in *Harris v. New York*, concerns of judicial integrity not only permit, but occasionally demand exceptions to *Miranda.*[126] Additionally, several existing

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> warnings to custodial suspects, they are disobeying the law while enforcing it? Doesn't the Court care that when the prosecution is allowed to use the physical fruits of police failures to comply with the *Miranda* rules, they 'invite' the police to turn their backs on *Miranda*?

Yale Kamisar, *Postscript: Another Look at* Patane *and* Seibert, *the 2004* Miranda *Poisoned Fruit Cases*, 2 OHIO ST. J. CRIM. L. 97, 104 (2004).

[122] United States v. Patane, 542 U.S. 630, 639 (2004).

[123] *Id.* at 635, 643. The officers conceded that a violation of *Miranda* occurred, and therefore Patane's statements, though voluntary, were inadmissible. However, the discovered physical evidence did not constitute testimonial evidence, and thus its admission did not implicate the Self-Incrimination Clause.

[124] Dickerson v. United States, 530 U.S. 428, 441 (2000).

[125] *Id.* at 443-44.

[126] Harris v. New York, 401 U.S. 222, 224 (1971) ("There is hardly justification for letting the defendant affirmatively resort to [perjury] in reliance on the Government's

Miranda exceptions permit the use of unwarned statements provided other criteria are satisfied. It is unclear why *Patane*, which only permits the admission of nontestimonial physical evidence, compromises judicial integrity whereas the impeachment exception[127] and public-safety exception[128] do not.

V. CONCLUSION

After evaluating the strengths and weaknesses of both deterrence and judicial-integrity based policies, it is apparent that the Mississippi Supreme Court should decline to extend the fruit-of-the-poisonous-tree doctrine to physical evidence derived from *Miranda* violations. The deterrence-based argument is simply unjustified in light of the interests at stake. Massachusetts declined to extend *Patane* solely in the name of deterrence, but the decision to do so relied primarily on a historically broad interpretation of Article 12 of the Massachusetts Constitution.[129] Conversely, the Mississippi courts have traditionally adhered to the "lock-step" theory of interpreting Article 3, Section 26 of the Mississippi Constitution.[130] If the Mississippi Supreme Court has thus far followed the Supreme Court's precedent in interpreting the Mississippi Constitution, it is highly unlikely that *Patane* will be rejected on independent state grounds because of deterrence concerns.

While the judicial-integrity argument is worthy of

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disability to challenge his credibility.").

[127] *Id.* at 226.

[128] New York v. Quarles, 467 U.S. 649 (1984).

[129] Commonwealth v. Martin, 827 N.E.2d 198, 204 (Mass. 2005). The Massachusetts Supreme Court noted that text, history, and prior interpretations of Article 12 "conclusively establish[ed] that it provide[d] greater rights than those enumerated in the Federal Constitution." *Id.* Massachusetts had previously rejected the Supreme Court's decision in *Elstad*. *See* Commonwealth v. Smith, 593 N.E.2d 1288 (Mass. 1992). Additionally, Ohio and Vermont have rejected *Patane* on independent state grounds in order to deter police misconduct. *See* State v. Peterson, 923 A.2d 585, 592 (Vt. 2007); State v. Farris, 849 N.E.2d 985, 995-96 (Ohio 2006).

[130] Price v. State, 752 So. 2d 1070, 74 (Miss. Ct. App. 1999) (stating that Mississippi case law has consistently applied the self-incrimination clause of Section 26 in the same manner as the Fifth Amendment). *See also* Byrom v. State, 863 So. 2d 836, 859 (Miss. 2003) (holding that *Elstad* is controlling precedent).

consideration, it alone cannot justify a rejection of the *Patane* decision on independent state grounds. Wisconsin rejected the *Patane* decision relying in part on concerns of judicial integrity.[131] However, this determination was preceded by an exhaustive discussion wherein the Wisconsin Supreme Court concluded that Article 1, Section 8 of the Wisconsin Constitution demanded more protection than the analogous Fifth Amendment.[132] Again, such policy considerations are noticeably absent under Section 26 of the Mississippi Constitution.[133] If the Mississippi Supreme Court demanded rigid adherence to *Miranda* as a means of preserving judicial integrity, it would mark a sudden, dramatic departure from the traditional "lock-step" interpretation of the Section 26 Self-Incrimination Clause. For the aforementioned reasons, such a departure is both unjustified and unnecessary.

Mississippi should adopt the *Patane* decision as controlling precedent, and thereby refuse to apply the fruits doctrine to physical evidence obtained through *Miranda* violations. There are simply no grounds on which to justify a more protective interpretation of Section 26. This conclusion is further supported by Mississippi's traditional "lock-step" interpretation of the Mississippi Constitution. By following *Patane*, Mississippi courts can maintain a proper balance between protecting the constitutional guarantee against self-incrimination and facilitating effective law enforcement.

Nathan L. Burrow

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[131] State v. Knapp, 700 N.W.2d 899, 921 (Wis. 2005) ("When law enforcement is encouraged to intentionally take unwarranted investigatory shortcuts to obtain convictions, the judicial process is systematically corrupted.").

[132] *Id.* at 914.

[133] Mississippi courts have previously concluded that "the seizure of evidence that is . . . not of a communicative nature, is not protected by the right against self-incrimination." Forrest v. State, 863 So. 2d 1056, 1061 (Miss. Ct. App. 2004).

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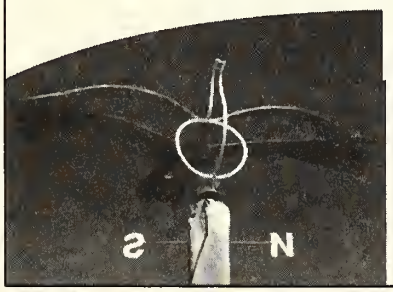

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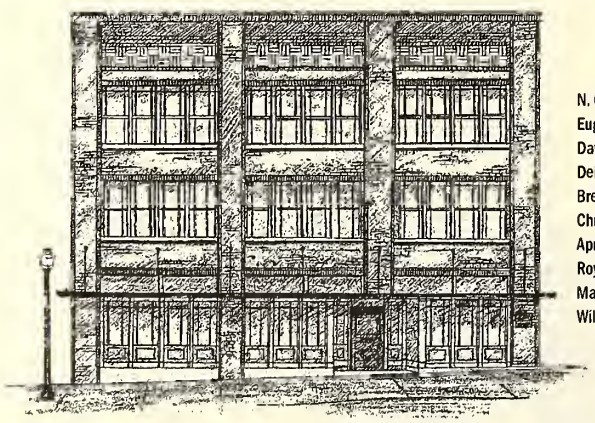

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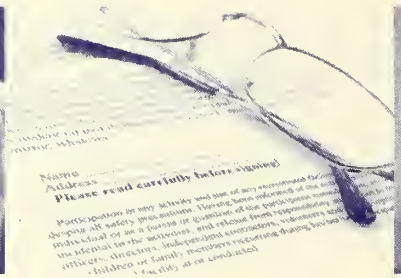

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